Supreme Court, U.S.
FILED
APR 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1334

In The
Supreme Court of the United States
October Term, 1986

JOHN M. SKEVIN,

Petitioner,

v.

SUPREME COURT OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION

W. CARY EDWARDS
Attorney General of New Jersey

*JAMES J. CIANCIA
Assistant Attorney General

CATHERINE M. BROWN
Deputy Attorney General
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-8567
Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

Whether the Court should grant a Petition to review an order of a State court of last resort disbarring an attorney after a plenary hearing and after a factual finding, based upon circumstantial but virtually undisputed evidence, that the attorney knowingly misappropriated client trust funds and when

(a) Questions One and Two of the Petition were not raised below, and when

(b) Question Three of the Petition is without merit.

TABLE OF CONTENTS

Page

OPINION BELOW AND RELATED PROCEDURAL HISTORY 1

JURISDICTION 1

STATE CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT

The Court is without jurisdiction to consider Questions One and Two of the Petition and, in any event, all Questions asserted are without merit 7

a. The issues raised in Questions One and Two of the Petition were not raised below and are, in any event without merit 7

b. The issue raised in Question Three of the Petition is without merit 17

CONCLUSION 21

APPENDIX:

Order of the Supreme Court of New Jersey Dated December 2, 1986 ..... App. 1

Order of the Supreme Court of New Jersey Dated December 16, 1986 ..... App. 2

Order of the Supreme Court of New Jersey Dated January 28, 1987 ..... App. 3

Brief on behalf of the respondent John Skevin Filed with the Supreme Court of New Jersey in *Matter of Skevin*, 104 *N.J.* 476 (1986) ..... App. 4

TABLE OF AUTHORITIES

Page

Cases Cited

Air Pollution Variance Board v. Western Alfalfa Corp., 416 *U.S.* 861 (1974) 9

Barsky v. Board of Regents of N.Y., 347 U.S. 442 (1953) 11

Bell v. Burson, 402 *U.S.* 535 (1971) 7, 9

Bowe v. Scott, 233 *U.S.* 656 (1914) 9

Brinkerhoff-Faris Trust Co. v. Hill, 281 *U.S.* 673 (1930) 10

Cardinale v. Louisiana, 394 *U.S.* 437 (1969) 8

Ex Parte Wall, 107 *U.S.* 265 (1883) 11

Exxon Corp. v. Gayerton, 462 *U.S.* 176 (1983) 8

Gannett Co. Inc. v. DePasquale, 443 *U.S.* 368 (1979) 20

Herb v. Pitcairn, 324 *U.S.* 117 (1945) 8

In re Gavel, 22 *N.J.* 248, 125 *A.*2d 696 (1956) 12

In re Logan, 70 *N.J.* 222, 358 *A.*2d 787 (1976) reh. 71 *N.J.* 583 (1976) 11

In re Oliver, 333 *U.S.* 257 (1948) 19

In re Ruffalo, 390 *U.S.* 544 (1968) reh. den. 391 *U.S.* 961 (1968) 9, 10, 11

In re Ryan, 60 *N.J.* 378, 290 *A.*2d 140 (1972) 12

In re Wilson, 81 *N.J.* 451, 409 *A.*2d 1153 (1979) 5, 6, 12, 14

Matter of Noonan, 102 *N.J.* 1167, 506 *A.*2d 722 (1986) 5, 6

Matter of Skevin, 104 *N.J.* 476, — *A.*2d — (1986) 1, 2, 4, 6, 8, 15, 17, 18

Morissette v. United States, 342 *U.S.* 246 (1952) 10, 14

TABLE OF AUTHORITIES—Continued

Page

Mullaney v. Wilbur, 421 *U.S.* 684 (1975) 11

Ohralik v. Ohio State Bar Assoc., 436 *U.S.* 437 (1978) 12, 14

Palmer Oil Corp. v. Amerada Corp., 343 *U.S.* 390 (1952) 8

Pruneyard Shopping Center v. Robins, 447 *U.S.* 74 (1980) 10

Randall v. Brigham, 7 *Wall.* 523, 19 *L.ed.* 285 (1869) 11

Richmond Newspapers, Inc. v. Va., 448 *U.S.* 555 (1980) 20

Sandstrom v. Montana, 442 *U.S.* 510 (1979) 11

Schware v. Board of Bar Examiners of New Mexico, 353 *U.S.* 232 (1957) 7, 9, 14, 16

Sheppard v. Maxwell, 384 *U.S.* 333 (1966) 9, 17, 19, 20, 21

Street v. New York, 394 *U.S.* 576 (1969) 8

United Mine Workers v. Dist. 12, Illinois Bar Assoc., 389 *U.S.* 217 (1967) 11, 12, 14

United States v. United States Gypsum Co., 438 *U.S.* 422 (1978) 11

CONSTITUTIONAL PROVISIONS CITED

N.J. Const. (1947), Art. I, ¶ 1 9

N.J. Const. (1947), Art. VI, § II, ¶ 3 ..... 1, 4, 12

STATUTES CITED

28 *U.S.C.* § 1257 8

28 *U.S.C.* § 1257(3) 1, 7, 8

TABLE OF AUTHORITIES--Continued

Page

COURT RULES CITED

F.R. Evid. 401 16
N.J.Ct.R. 1:14 4
N.J.Ct.R. 1:20-2 5
N.J.Ct.R. 1:20-3 17
N.J.Ct.R. 1:20-3(f) 17
N.J.Ct.R. 1:20-3(h) 17
N.J.Ct.R. 1:20-4 18
N.J.Ct.R. 1:20-5 18
N.J.Ct.R. 1:20-10(a) 18
N.J.Ct.R. 1:20-10(a)(1) 18, 19
N.J.Ct.R. 1:20-11(b) 18
N.J.Ct.R. 1:21-6(a) 4
N.J.Ct.R. 1:21-6(b)(1) 4
N.J.Ct.R. 1:21-6(b)(2) 5
N.J.Ct.R. 1:21-6(c) 5

MISCELLANEOUS

J. McCormick, *Evidence* (2d Ed. 1972) 16

OPINION BELOW AND RELATED PROCEDURAL HISTORY

The opinion below is reported at *Matter of Skevin*, 104 *N.J.* 476 (1986). (Reprinted at Petitioner's Appendix A; hereafter referred to as Pet. App.). Thereafter, a stay of the disbarment order was sought from the New Jersey Supreme Court and granted, but only to allow Skevin time to apply to the Court for a stay. (Resp. App. at 2). An application to the Court for a stay was granted December 23, 1986 by Justice William J. Brennan, Jr. (App. D at 27).

JURISDICTION

The judgment of the New Jersey State Supreme Court was entered November 14, 1986. The jurisdiction of the Court to review a final judgment of a state court of last resort is invoked pursuant to 28 *U.S.C.* § 1257(3). The respondent asserts the Court is without jurisdiction to review the federal questions raised in Questions One and Two of the Petition, inasmuch as these questions were not raised below.

STATE CONSTITUTIONAL PROVISION INVOLVED

N.J. Const (1947), Art. VI, § II, ¶ 3 provides as follows:

> The Supreme Court shall make rules governing the administration of all courts in the State and, subject

to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

———o———

STATEMENT OF THE CASE

Petitioner John Skevin was admitted to the New Jersey Bar in 1956. He was disbarred by order of the respondent, the Supreme Court of New Jersey, on November 14, 1986 because he knowingly misappropriated client trust funds. (Pet. App. B at 17).

Skevin was a single practitioner, with at times one or two associates, who had been active in state politics. In 1984, a nine-count, amended disciplinary complaint was filed against Skevin. The amended complaint charged numerous disciplinary infractions, including inappropriate advancement of settlement funds, *Matter of Skevin,* 104 *N.J.* 476, 480, 481 (1986) (Pet. App. A at 4, 6); loaning monies to a client, *id.* at 481 (Pet. App. A at 6); failing to obtain fee agreements; failing to advise of alternative fees, and miscalculating contingent fees, *Id.* at 481 (Pet. App. A at 6). The amended complaint also charged instances of overdrafts of Skevin's business, personal and trust accounts. *Id.* (Pet. App. A at 6).

Some of these charges were dismissed and none were of such a nature to warrant disbarment. *Id.* at 478-81 (Pet. App A at 1-6). Three counts of the amended com-

plaint, however, charged knowing misappropriation of client trust funds.

The facts relating to these three counts, which were for the most part stipulated to by the parties, were that Skevin was out-of-trust for substantial periods of time between 1982 and 1983. In one six month interval, for example, Skevin was out-of-trust the *entire period,* and for sizeable sums: in June, 1982, $12,469.99; in July, 1982, $70,267.31; in August, 1982, $72,252.18; in September, 1982, $65,618.20; in October, 1982, $92,552.27; in November, 1982, $114,704.29, and in December, 1982, $133,476.40. *Id.* at 483 (Pet. App. A at 8).

The shortfall in Skevin's trust account was not immediately apparent because Skevin regularly commingled personal monies with trust funds. He claimed, for example, that during 1982-1983 he deposited an aggregate of nearly $1 million dollars of personal monies into his trust account. *Id.* at 483 (Pet. App. A at 8). Skevin, however, kept no contemporaneous records that would indicate the amount of personal funds in the trust account. *Id.* at 402-03 (Pet. App. A at 7-8). The evidence also revealed that Skevin withdrew monies from his trust account as reimbursement for his fees and costs well in advance of his receipt of settlement funds. *Id.* at 479-80 (Pet. App. A at 4). On several occasions, he disbursed money to one client, John Schrader, prior to his receipt of settlement funds. *Id.* at 479-80 (Pet. App. A at 4). While all these facts were virtually undisputed, Skevin denied, and continues to deny, that he *knowingly* misappropriated trust funds.

Since 1948, the Supreme Court of New Jersey has been vested with the exclusive power to regulate the admission, conduct and disbarment of attorneys licensed to practice law in the State. *N.J. Const.*, (1947), Art. VI, § II, ¶ 3. Pursuant to this power, the Supreme Court has enacted a comprehensive scheme regulating the conduct of all practicing attorneys. As part of this scheme the Rules of Professional Conduct of the American Bar Association, as supplemented by the Supreme Court, have been incorporated into the court rules. *N.J. Ct. R.* 1:14. These Rules require, *inter alia,* the segregation of client monies and an attorney's own funds. *N.J. Ct. R.* 1:14, Appendix I at RPC 1.15(a).[1]

The Supreme Court has also imposed very specific rules regarding the maintenance of trust accounts. Any such account must be clearly marked as a trust account and be maintained in a financial institution in New Jersey authorized by the Supreme Court to hold trust funds. A balance sheet listing every trust account deposit and withdrawal must be maintained, separate from other attorney accounts. *N.J. Ct. R.* 1:21-6(b)(1); *N.J. Ct. R.* 1:21-6(a). In addition, for every client for whom funds are escrowed, the attorney must maintain a separate led-

---

[1]For the sake of convenience, all citations to the Supreme Court's regulatory scheme are to the court rules currently in force. These rules include amendments made after the time-period at issue in the instant action. No significant change has been made in the substance of the rules pertinent to this matter, however. *See In the Matter of Skevin, supra,* 104 *N.J.* at 482 (Pet. App. A at 7).

ger detailing every financial transaction made on the client's behalf. *N.J. Ct. R.* 1:21-6(b)(2). A "regular trial balance of the individual client trust ledgers shall be maintained." *Id.* An attorney's trust account records must be made available for inspection upon demand by the Office of Attorney Ethics, the disciplinary investigation and prosecutorial arm of the Court. *N.J. Ct. R.* 1:21-6(c); *N.J. Ct. R.* 1:20-2.

The regulations promulgated by the Court regarding the maintenance of attorney trust accounts are stringent. Properly adhered to, however, they insure that an attorney is aware at all times of the aggregate sum of money in his trust account as well as the current balance of the monies held in trust on behalf of each client. The rigor of these regulations is warranted because the Court, in 1979, put the Bar on notice that the sanction for knowing misappropriation of client funds would "almost invariab[ly]" be disbarment. *In re Wilson,* 81 *N.J.* 451, 453, 409 *A.*2d 1153, 1154 (1979). Thereafter, the Court ruled that some sanction short of disbarment was appropriate whenever an attorney's misappropriation of his client's funds was not knowing, but was, rather, the product of inadvertent error or neglect. *Matter of Noonan,* 102 *N.J.* 1167, 506 *A.*2d 722 (1986).

Because Skevin denied that he knowingly misappropriated client funds, the key question before the Supreme Court was whether his conduct, which resulted in a six-month trust account shortage that at times exceeded $100,000, coupled with the comingling of approximately one million dollars of personal funds and the failure to main-

tain contemporaneous trust account records, evidenced knowing misappropriation of client funds, for which the sanction of disbarment would be warranted, *see In re Wilson, supra,* or evidenced inadvertent error or neglect, for which some sanction other than disbarment might be suitable. *See Matter of Noonan, supra. Matter of Skevin, supra,* 104 *N.J.* at 484 (Pet. App. A at 10). After a plenary fact-finding hearing conducted by a Special Master, after a report and recommendation by a state-wide disciplinary board, and after respondent's own review of the record, the Supreme Court found that Skevin's conduct was the result of knowing misappropriation of funds and ordered his disbarment. *Id.* at 477 (Pet. App. A at 1). No petition for rehearing was sought. By order of December 2, 1986, however, disbarment was delayed until December 16, 1986. (Resp. App. 1). On December 16, 1986, Skevin sought a stay of the Order from the New Jersey Supreme Court to allow him time to make an application to this Court for a stay, prior to filing a Petition for Certiorari. His application was granted and a stay of the Order was entered until December 19, 1986. (Resp. App. 2). On December 23, 1986, Justice William J. Brennan, Jr., granted Skevin's application for a stay pending disposition of this Petition. (Pet. App. D at 27).

Skevin raises two separate federal constitutional claims in support of his petition. The first is a substantive due process claim that he may not be disbarred on the basis of circumstantial evidence offered to prove state of mind and absent an inquiry into his "current character and fitness to practice law" (Petition at Questions One and Two). The next is a procedural due process claim that his disbarment proceedings were fatally infected by prejudicial

pretrial publicity. The respondent contends the Petition should be denied because it raises federal questions which were not presented below and which are, in any event, meritless.

REASONS FOR DENYING THE WRIT

THE COURT IS WITHOUT JURISDICTION TO CONSIDER QUESTIONS ONE AND TWO OF THE PETITION AND, IN ANY EVENT, ALL THE QUESTIONS ASSERTED ARE WITHOUT MERIT.

A. The Issues Raised In Questions One and Two of the Petition Were Not Raised Below and Are In Any Event Without Merit.

Skevin claims a substantive due process right not to be disbarred absent a showing that he is, at the time the sanction is imposed, morally and professionally unfit to practice law. He cites as the source of this federal constitutional right *Schware v. Board of Bar Examiners of New Mexico*, 353 *U.S.* 232 (1957) and *Bell v. Burson*, 402 *U.S.* 535 (1971). He also claims, erroneously, that the respondent conclusively presumes knowing misappropriation of client funds from evidence of actual misappropriation, in violation of his federal due process rights. *See* Petition Questions One and Two; Pet. Brief at 12-17. Neither of these federal claims was presented to the New Jersey Supreme Court and, hence, the Court lacks jurisdiction to consider them now.

28 *U.S.C.* § 1257 permits review of the judgment of a state court of last resort by Petition for Certiorari only when a federal question has been raised in the state court

proceeding. 28 *U.S.C.* § 1257(3). *Cardinale v. Louisiana,* 394 *U.S.* 437, 439 (1969). The federal question asserted, moreover, must be "substantial." *Palmer Oil Corp. v. Amerada Corp.,* 343 *U.S.* 390 (1952).

The New Jersey Supreme Court did not expressly consider or resolve any federal constitutional questions in its decision to disbar John Skevin. *Matter of Skevin, supra,* 104 *N.J.* 476. (Pet. App. A). In such an instance, the petitioner has the burden of demonstrating to the Court, by certificate from the state supreme court, *Herb v. Pitcairn,* 324 *U.S.* 117, 128 (1945), or by specific reference to the record or otherwise, *R.* 21.1(h), that the federal claim was actually drawn into question below. *Exxon Corp. v. Gayerton,* 462 *U.S.* 176, 181 n. 3 (1983). Where, as here, the state court has failed to comment on the purportedly raised federal claim, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York,* 394 *U.S.* 576, 582 (1969).

Skevin attempts to meet his burden by pointing out that on three different pages of the 62-page brief he submitted below he capsulized the argument he now makes to the Court in support of Questions One and Two of his Petition. He also asserts that at one point of his argument below he specifically referred to "due process." (Pet. Brief at 20 referring to Resp. App. at 36, 37 and 42).

The brief Skevin submitted below is set forth in full in Respondent's Appendix at 4-58. A review of the Table of Citations reveals that not a single case relied upon by Skevin now in support of his substantive claim, namely,

Schware, supra, or *Bell v. Burson, supra,* was cited to the New Jersey Supreme Court. (Resp. App. at 6-8). Indeed, only three of the forty cases cited to the New Jersey Supreme Court are from any federal court at all, and only two of those, *In re Ruffalo,* 390 *U.S.* 544 (1968) *reh. den.* 391 *U.S.* 961 (1968) and *Sheppard v. Maxwell,* 384 *U.S.* 333 (1966) are decisions of the Court. (Resp. App. 6-8). Further, the reference to "due process" at page 42 of the brief is unaccompanied by any specific reference to the Due Process Clause *of the Fourteenth Amendment.* (Resp. App. at 42) (*See also* Table of Citations, Resp. App. at 6-8: no citation to any federal constitutional provision).

The Court has long assumed that non-specific references in legal argument to "due process" are references to state constitutional law in those states which have a due process provision in their state constitutions. *Bowe v. Scott,* 233 *U.S.* 656, 664-65 (1914); *Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 *U.S.* 861, 865-66 (1974). New Jersey has a due process provision in its constitution. *N.J.* Const. (1947) Art. I, ¶1. Thus, Skevin has not met his burden of proving that the federal constitutional questions raised in Questions One and Two of his Petition were raised below.

Skevin contends, however, that he notified the New Jersey Supreme Court of the federal constitutional claims he now raises in his Petition one month after the disbarment order was issued, on December 16, 1986, when he applied to the Supreme Court for a stay of the disbarment order pending consideration of his Petition for Certiorari. He notes that attached to his application for a stay was a

"near-final draft" of his application to Justice William J. Brennan, Jr., for a stay and that this draft raised all his federal claims. (Pet. Brief at 21). Raising a federal question after final judgment by the state court of last resort, however, is timely only when the state court's decision is unexpected, and the petitioner could not reasonably have anticipated the federal question. *Pruneyard Shopping Center v. Robins,* 447 *U.S.* 74, 85-86 n. 9 (1980); *Brinkerhoff-Faris Trust Co. v. Hill,* 281 *U.S.* 673, 677-78 (1930). Here Skevin knew from the outset that the key question in his case was whether the evidence presented proved his knowing misappropration of funds for which disbarment was the likely sanction. *In re Wilson, supra,* 81 *N.J.* 451. Thus, it is submitted, Skevin has failed to demonstrate to the Court that he properly raised the federal question presented in Questions One and Two of the Petition. It is submitted, therefore, that certiorari to consider Questions One and Two should be denied.

In any event, the federal claims asserted in Questions One and Two of the Petition are without merit and do not warrant this Court's review. Skevin's argument is that an attorney disbarment proceeding is tantamount to being charged with a crime, citing *In re Ruffalo,* 390 *U.S.* 544 (1968) (attorney disbarment proceeding quasi-criminal in nature) and that thus, as a matter of federal due process applicable to the states by the Fourteenth Amendment, an essential element of the offense of knowing misappropriation of trust funds must be a specific intent to misappropriate for an illegal purpose, citing *Morissette v. United States,* 342 *U.S.* 246 (1952). Skevin further contends, erroneously, that the Supreme Court of New Jersey

conclusively presumes the element of "knowing" misappropriation funds from evidence of actual misappropriation of funds in contravention of *Sandstrom v. Montana,* 442 *U.S.* 510 (1979) (presumption which operates to shift burden of persuasion to defendant of an element of the offense charged in a criminal case violative of due process). *See also United States v. United States Gypsum Co.,* 438 *U.S.* 422 (1978); *Mullaney v. Wilbur,* 421 *U.S.* 684 (1975). (*See* Pet. Brief at 14-17).

Attorney disbarment proceedings have at various times been characterized as quasi-criminal in nature, *In re Ruffalo, supra;* civil in nature, *Randall v. Brigham,* 7 *Wall.* 523, 19 *L.Ed.* 285 (1869); *Ex Parte Wall,* 107 *U.S.* 265 (1883) or *sui generis, In re Logan,* 70 *N.J.* 222, 358 *A.*2d 787 (1976) reh. 71 *N.J.* 583, 367 *A.*2d 419. From the standpoint of federal constitutional analysis, however, the difference between these characterizations is one of semantics only; whether a disbarment proceeding is viewed as quasi-criminal in nature, *Ruffalo, supra,* or as a civil proceeding involving the loss of a federally protected property right in the license to practice a regulated profession, *Barsky v. Board of Regents of N.Y.,* 347 *U.S.* 442 (1953) (revocation of medical license), the substantive due process analysis is the same: is the state regulation authorizing disbarment rationally related to a legitimate state objective, *United Mine Workers v. Dist. 12, Illinois Bar Assoc.,* 389 *U.S.* 217, 222 (1967).

The regulation of the legal profession has long been deemed by the Court to be a matter of special state re-

sponsibility. The Court has stated that state restrictions on the practice of law are constitutional as long as they bear a rational connection to this concededly legitimate state goal. *Ohralik v. Ohio State Bar Assoc.*, 436 *U.S.* 437, 488-89 (1978), *United Mine Workers v. District 12, Illinois State Bar Assoc.*, 389 *U.S.* 217, 222 (1967).

In New Jersey, all power to regulate the legal profession is vested in its Supreme Court. *N.J. Const.* (1947) Art. VI, § II, ¶ 3. In 1979, the Court adopted a policy that the sanction for knowing misappropriation of funds would "almost invariab[ly]" lead to disbarment. *In re Wilson, supra,* 81 *N.J.* 451, 453, 409 *A.*2d 1153, 1154 (1979). The practice of ordering disbarment as a sanction for knowing misappropriation of funds was not new in this State. *See In re Ryan,* 60 *N.J.* 378, 290 *A.*2d 140 (1972); *In re Gavel,* 22 *N.J.* 248, 125 *A.*2d 696 (1956). The significance of *Wilson* was that for the first time the Court determined as a matter of policy that the general imposition of the sanction of disbarment for knowing misappropriation of trust funds was the only effective means to preserve the "confidence of the public in the integrity and trustworthiness of lawyers in general" the policy goal the New Jersey Supreme Court identified as "the principal reason for [attorney] discipline." *In re Wilson, supra,* 81 *N.J.* at 456, 409 *A.*2d at 1155.

In adopting this policy the Court carefully examined the mitigating circumstances frequently asserted in misappropriation cases as justification for imposing some sanction short of disbarment. These are, primarily, that the attorney has made restitution; that the attorney has corrected the bookkeeping practices that contributed to the

misappropriation, and the experience, or lack thereof, of the lawyer.

As to restitution, the Court found this "honesty of compulsion," *id.* at 457, 409 *A.*2d at 1156, wanting as a justification for imposing a sanction less than disbarment for one who knowingly misappropriates trust funds:

> Judicial consideration of restitution as a mitigating factor in disciplinary proceedings creates the impression that sanctions are proportioned in accordance with ability to pay, rather than gauged against the seriousness of the misconduct. Furthermore, according significance to restitution leads to an obvious and substantial possibility of unjust discrimination [against those who can not afford to make restitution]. [*Id.* at 459, 409 *A.*2d at 1156-57. *See generally, id.* at 457-459, 409 *A.*2d at 1156-57].

The Supreme Court likewise found assertions that the attorney had reformed sloppy bookkeeping practices, or was otherwise a highly qualified and experienced lawyer, did not outweigh the considerations which favored a policy of disbarment for knowing misappropriation of client funds. Reform of sloppy bookkeeping practices was, in the Court's opinion, "the least that one would expect. Its only significance is that it would be doubly unthinkable to permit resumption of practice by an offending attorney who remained unwilling or unable to set up proper books and records." *Id.* at 459, 409 *A.*2d at 1157. The Court further found the experience and prior outstanding career of a lawyer to be "less important . . . where misappropriation is involved. The offense against common honesty should be clear even to the youngest; and to distinguished practitioners, its grievousness should be even clearer." *Id.* at 460, 409 *A.*2d at 1157 (footnote omitted).

Thus, the New Jersey Supreme Court adopted a policy of "almost invariable" disbarment as a sanction for knowing misappropriation of client funds in order to further its stated aim of preserving the public trust in the legal profession. *Id.* at 453, 409 *A.*2d at 1154. Preserving the public trust in the legal profession is a legitimate exercise of police power. *Oralik, supra; United Mine Workers, supra,* and the New Jersey Supreme Court's virtual disbarment policy is certainly a rational means to achieve this goal. And because the virtual disbarment policy for knowing misappropriation of trust funds is a rationally related means to effectuate a legitimate policy goal, the failure of the New Jersey Supreme Court to require proof of a specific illegal purpose as an element of the charge of knowing misappropriation does not violate the Due Process Clause of the Fourteenth Amendment. Further, *Morissette v. United States, supra,* 342 *U.S.* 246, relied upon by Skevin in support of this argument does not support his proposition. *Morissette* simply stands for the proposition that one cannot, as a matter of federal due process, be sanctioned for *criminal* conduct absent a proof beyond a reasonable doubt of a specific culpable intent and that such specific intent should be construed in a federal penal statute which fails to so expressly state. *Id. Morissette* expressly stated, moreover, that due process does not require proof of specific illegal intent as an element of non-criminal, public welfare regulations. *Morissette v. United States, supra,* 342 *U.S.* at 254-60.

The application of the *Wilson* rule to Skevin's case is not arbitrary; it is amply supported by the evidence. *Schware v. Board of Bar Examiners of New Mexico, supra,* 353 *U.S.* 232. The evidence before the New Jersey Su-

preme Court was that Skevin was substantially out-of-trust for much of 1982-1983; that Skevin commingled nearly $1 million dollars of his personal funds with trust monies during this period and that Skevin kept no contemporaneous financial records. While these facts were undisputed, Skevin denied that he knowingly misappropriated funds. Notwithstanding Skevin's denial, the Court concluded the evidence clearly and convincingly established that Skevin knew he misappropriated funds and ordered his disbarment. *Matter of Skevin, supra,* 104 *N.J.* 476 (Pet. App. A).

Skevin would like the Court to believe that the New Jersey Supreme Court did not engage in any fact finding on the question of whether Skevin knew he misappropriated funds, but, rather, conclusively presumed Skevin knew he misappropriated trust funds simply from evidence of actual misappropriation of trust monies. This is not correct. Evidence of "knowing" is an element of the disciplinary infraction of knowing misappropriation. This element must be proved by clear and convincing evidence. *Id.* at 476 (Pet. App. A at 1). The Supreme Court itself expressly stated that the key question in Skevin's case was whether he knowingly misappropriated funds, which would result in disbarment, or whether the misappropriation was due to inadvertence, which would result in a sanction short of permanent disbarment. *Id.* at 484 (Pet. App. A at 10).

At bottom, Skevin is aggrieved because the New Jersey Supreme Court found he misappropriated funds despite his express denial that he *knowingly* misappropriated client funds. What Skevin is really arguing to the Court is that he may not be disbarred, as a matter of federal con-

stitutional law, absent *direct* evidence of "knowing" misappropriation.[2] It is true that in this case Skevin's state of mind was proved by *circumstantial evidence,* but it is well settled that circumstantial evidence is a perfectly acceptable method with which to prove intent in both criminal as well as civil evidentiary proceedings. *See generally F.R.Evid.* 401; J. McCormick, *Evidence,* 435-36 (2d Ed. 1972).

Skevin also suggests that as a matter of federal constitutional law the requisite criteria for disbarment is "current moral and professional fitness to practice law," relying on *Schware v. Board of Bar Examiners of New Mexico, supra,* 353 *U.S.* 232 (1957). (Pet. Brief at 13). *Schware* does not support this proposition. It simply holds that a decision to deny admission to a bar applicant on the grounds of moral unfitness must as a matter of federal due process be supported by evidence in the record. As discussed, *supra,* the evidence in this case amply supports a finding that Skevin knowingly misappropriated funds. In any event, if knowing misappropriation of funds to the degree engaged in by Skevin is not indicia of moral and prefessional unfitness to practice law, respondent does not know what is.[3]

---

[2]Such a standard, of course, would permit a finding of "knowing" misappropriation only in those rare cases in which the attorney actually admitted his misconduct.

[3]Skevin contends that there have been no instances of misappropriation *after* the filing of the amended disciplinary complaint and that, therefore, he may not be disbarred. Certainly, the proper handling of trust monies *after* a disciplinary complaint had been filed does not tend to show whether or not

(Continued on following page)

For all the foregoing reasons, accordingly, the Court should not grant certiorari to review Questions One and Two of the Petition.

B. The Issue Raised in Question Three of the Petition is Without Merit.

Citing *Sheppard v. Maxwell*, 384 *U.S.* 333 (1966), Skevin contends the Supreme Court of New Jersey disbarred him because it was improperly influenced by pretrial publicity, in violation of his federal procedural due process rights. A disciplinary proceeding in New Jersey is normally a three-tiered process. An ethics grievance is initially filed with a District Ethics Committee, a local board which conducts a preliminary investigation and recommends what type of further action, if any, need be taken. *N.J. Ct. R.* 1:20-3. If the Committee determines that unethical conduct occurred for which a private reprimand is an inappropriate sanction, a formal complaint is filed. *N.J. Ct. R.* 1:20-3(f), (h).[4] A plenary hearing is con-

---

(Continued from previous page)

an attorney knowingly misappropriated funds *before* the filing of the complaint. In any event, Skevin's improved conduct was only because the Supreme Court required Skevin, *pendente lite*, to practice under the guidance of a proctor who was required to co-sign all checks. *Matter of Skevin, supra*, 104 *N.J.* at 482-483; (Pet. App. A at 8-9; Resp. App. at 3). This requirement is still in force. (Resp. App. at 3). It is not at all clear, furthermore, that Skevin would have been able to avoid misappropriation of trust funds without the proctorship; one proctor advised the Supreme Court of an instance in which he had discouraged Skevin from borrowing money from a client for whom he had just obtained a judgment. (Pet. App. E at 30, ¶ 8). Obviously, Skevin continues to exercise poor judgment when it comes to financial matters involving his clients.

[4]In Skevin's case, the function of the District Committee was performed, at the direction of the Supreme Court, by a special master, who was a retired trial judge. *Matter of Skevin, supra*, 140 *N.J.* at 483 (Pet. App. A at 9).

ducted and the Committee makes a factual finding and recommendation to the Disciplinary Review Board, a statewide committee which makes a *de novo* review of the record and determines whether to adopt, modify or reverse the findings of the Committee. *N.J. Ct. R.* 1:20-4. The matter is then referred to the Supreme Court for review and decision. *N.J. Ct. R.* 1:20-5.

Proceedings before the District Committee (or in Skevin's case, the Special Master), and the Disciplinary Review Board are confidential, *N.J. Ct. R.* 1:20-10(a). However, once a matter is scheduled by the Supreme Court for oral argument for final discipline, "the recommendation of the [Disciplinary Review] Board that is the subject thereof, together with any briefs filed pursuant to an order of the Court, *shall* be made public . . . ." *N.J. Ct. R.* 1:20-10(a)(1) (emphasis added). Grievants and witnesses are absolutely immune from a civil suit as long as they do not breach the confidentiality of the disciplinary process. *N.J. Ct. R.* 1:20-11(b).

Prior to the filing of the amended disciplinary complaint, Skevin had been active in state politics and had served, until 1981, two terms as a state senator. He was a public figure who, at the time of disciplinary hearing, continued to attract public attention.

The first news articles about the disciplinary proceedings against Skevin occurred in June, 1984, after oral argument to the Supreme Court on a motion to suspend Skevin from practice *pendente lite*. (Pet. App. F at 32).[5]

---

[5]This motion was denied. *In re Skevin*, 104 N.J. at 483 (Pet. App. A at 9).

As Skevin acknowledges, all disciplinary matters presented to the Supreme Court are conducted in open court, so that the publicity generated by this motion was not a breach of the confidentiality rules of the Court. (Pet. Brief at 7). Two months later, two complainants, John and Joseph Schraeder, breached the confidentiality of the disciplinary process on two separate occasions by making information available, *inter alia,* to a reporter for the New York Times. This occurred after the evidentiary hearing was conducted before the Special Master. (Pet. App. F at 33). The Special Master's report was completed the following spring. This report was also leaked to a reporter who wrote an article about it.[6] Thereafter, when the Disciplinary Review Board referred the matter to the Supreme Court and final argument was scheduled, the report of the Board was made public, as is permitted by the court rules. *N.J. Ct. R.* 1:20-10(a)(1). The Board's recommendation, which occurred at the time that the Supreme Court decided several other disbarment matters, generated attention. (Pet. App. E at 36-40).

Skevin contends this publicity, which occurred over a two year period, was so prejudicial that it prevented the Supreme Court from making an impartial determination of his case and hence violated his federal procedural due process rights, citing *Sheppard v. Maxwell,* 384 *U.S.* 333 (1966). This is not so.

Even in the criminal context, the Due Process Clause safeguards the right to *public* pretrial and trial proceedings. *In re Oliver,* 333 *U.S.* 257 (1948) (criminal defendant

---

[6]Skevin does not include this article in his appendix.

has Sixth Amendment right to public trial); *Richmond Newspapers, Inc. v. Va.*, 448 *U.S.* 555 (1980) (public has First and Fourteenth Amendment right of access to criminal trial); *Gannett Co. Inc. v. DePasquale*, 443 *U.S.* 368 (1979) (public has First and Fourteenth Amendment right of access to pretrial criminal proceedings). From the standpoint of federal due process, a closed legal proceeding is the exception, not the rule.

Thus, if Skevin had been charged with a crime instead of a disciplinary infraction, the Due Process Clause would require that the proceedings in his case be open. *Sheppard* only holds that when publicity is of such a nature and degree that it threatens the impartiality of the lay factfinder (*i.e.*, jury), a criminal defendant's constitutional right to a fair trial overrides the public's constitutional right of access. *Sheppard v. Maxwell*, 384 *U.S.* 333 (1966) (defendant entitled to new trial when publicity of a sensational nature while jury trial was ongoing and when presence of media in courtroom so pervasive that it disrupted courtroom proceedings).

Skevin refers the Court to two news articles (Pet. App. F at 33-35) and mentions a third article, which were all written as a result of information improperly leaked to the media, as being unduly prejudicial.[7] These articles appeared well before the Supreme Court heard and de-

---

[7]The source of two of these leaks were two complainants John and Joseph Schraeder. (Pet. App. F at 33-35). Skevin wants the Court to believe the Office of Attorney Ethics, the enforcement arm of the Court in disciplinary matters, was responsible for the third leak. (Pet. Brief at 8-9). This is not so. All parties had access to the Special Master's report which was leaked to the press. The source of the leak remains undetermined.

cided Skevin's case. Even assuming *arguendo* that *Sheppard* was applicable in a non-criminal context, these three articles are hardly of a nature to trigger *Sheppard*. Further, Skevin's suggestion that the members of the Supreme Court of New Jersey would not be able to maintain their objectivity and impartiality under such circumstances is specious. For all these reasons, accordingly, the Court should not grant certiorari to review Question Three of the petition.

———o———

CONCLUSION

For the foregong reasons, Court should not grant Skevin's Petition for *certiorari*.

Respectfully submitted,

W. Cary Edwards
Attorney General of New Jersey

*James J. Ciancia
Assistant Attorney General

Catherine M. Brown
Deputy Attorney General
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-8567
Attorneys for Respondent

*Counsel of Record

APPENDIX

SUPREME COURT OF NEW JERSEY
D-2 September Term 1986

IN THE MATTER OF
JOHN M. SKEVIN, ORDER
An Attorney at Law.

This matter having come before the Court on the application of JOHN M. SKEVIN, seeking a modification of the Order of this Court entered November 14, 1986, and the Court having reviewed the arguments of the parties, and good cause appearing;

It is ORDERED that respondent's disbarment shall take effect Tuesday, December 16, 1986; and it is further

ORDERED that Leon J. Sokol, Esquire, shall serve as proctor of the respondent until the Order of disbarment takes effect, and that as a part of his duties, to be exercised in accordance with Administrative Guideline # 28, said Leon J. Sokol, Esquire, shall oversee all financial transactions of respondent, including the cosigning of all checks, deposits, and withdrawals made during the period provided for by this Order.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 2nd day of December, 1986.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT
OF NEW JERSEY

SUPREME COURT OF NEW JERSEY
D-2 September Term 1986

IN THE MATTER OF
JOHN M. SKEVIN, ORDER
An Attorney at Law.

This matter having been duly presented to the Court on respondent's application for a stay of his disbarment pending an application for relief to the Supreme Court of the United States;

It is ORDERED that the disbarment of JOHN M. SKEVIN of Hackensack is hereby stayed through December 19, 1986, provided that an application for emergent relief is submitted to a single Justice of the Supreme Court of the United States before 5:00 p.m., December 17, 1986; and it is further

ORDERED that unless relief is granted by the Supreme Court, the stay provided for by this Order shall terminate at 5:00 p.m. on December 19, 1986, or upon the entry of an Order by a single Justice denying relief, whichever may occur first.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 16th day of December, 1986.

/s/ Stephen W. Townsend
Clerk

SUPREME COURT OF NEW JERSEY
D-2 September Term 1986

IN THE MATTER OF
JOHN M. SKEVIN, ORDER
An Attorney at Law.

This matter having been duly considered by the Court, and good cause appearing;

It is ORDERED that pending the resolution of the petition for a writ of *certiorari* now before the Supreme Court of the United States and until the further Order of this Court, Leon J. Sokol, Esquire, shall continue to serve as proctor to respondent pursuant to Administrative Guideline No. 28.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 28th day of January, 1987.

/s/ Stephen W. Townsend
Clerk of the Supreme Court

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Stephen W. Townsend
Clerk of the Supreme Court of New Jersey

SUPREME COURT OF
THE STATE OF NEW JERSEY

Docket No. D-14

In the Matter of

JOHN M. SKEVIN
ATTORNEY AT LAW

Previously Before
Disciplinary Review Board
(Decision Rendered
May 23, 1986)

BRIEF ON BEHALF OF RESPONDENT, JOHN M. SKEVIN, ESQ.

LEON J. SOKOL, ESQ.
Greenstone and Sokol, Esqs.
39 Hudson Street
Hackensack, New Jersey 07601
(201) 488-3930
Attorneys for Respondent

MICHAEL C. URCIUOLI, ESQ.
and
FRANK A. CAMPANA, ESQ.
On the Brief

TABLE OF CONTENTS

Page*

Table of Citations ii

Preliminary Statement 1

Statement of the Case 2

Argument:

I. DISBARMENT IS NOT AN APPROPRIATE REMEDY IN THE CASE AT BAR 34

A. The Wilson standard of knowing misappropriation has not been met by clear and convincing evidence 34

B. All doubts must be resolved in favor of the Respondent 43

C. Disbarment is not the proper penalty in the case at bar, and mitigating factors should permit Respondent to continue to practice 45

II. THE VIOLATIONS OF THE CONFIDENTIALITY RULE ARE VIOLATIONS OF MR. SKEVIN'S RIGHT TO DUE PROCESS AND SUCH A BLATANT AFFRONT TO THE INTEGRITY OF THE COURT, THAT THIS CASE SHOULD BE DISMISSED OR ANY PENALTY IMPOSED MITIGATED 51

A. Mr. Skevin's right to privacy was violated 54

B. Mr. Skevin's right to a fair hearing and determination has been prejudiced 58

Conclusion 62

---

* Page references are to the typewritten brief submitted below and not as printed herein.

TABLE OF CITATIONS

PAGE NO.

TABLE OF CASES

In re Arndt, 67 N.J. 432 (1975) 34, 54

Bechler v. Parsekian, 36 N.J. 242 (1961) 54

In Re Boardwalk Regency Casino License Application, 180 N.J. Super. 324 (App. Div. 1981), *modified*, 90 N.J. 361 (1982) 36, 37

Brogan Cadillac, etc. v. Central Jersey Bank & Trust, 183 N.J. Super. 333 (1981) 43

Coggs v. Bernard, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1704) 42

Cohen v. Press, 31 N.J. Super. 45 (1954) 42

In re Cornish, 98 N.J. 500 (1985) 47

Cushway v. State Bar, 170 S.E. 2d. 732, 120 Ga. App. 371 (1969), *cert. denied*, 90 S.Ct. 1705, 398 U.S. 910, 26 L.Ed. 2d 71, *reh'g denied* 90 S.Ct. 2256, 399 U.S. 938, 26 L.Ed. 2d 810 (1969) 36

David v. Strelecki, 97 N.J. Super. 360 (1967), *rev'd on other grounds*, 51 N.J. 563 (1968) 53

David v. June Strelecki, 51 N.J. 563 (1968) 54

Matter of Dondi, 63 N.Y. 2d 331, 482 N.Y.S. 2d 431, 472 N.E. 2d 281 (1984) 55

Draney v. Bachman, 138 *N.J. Super.* 503 (1976) 43

Erdman v. Stevens, 458 F. 2d 1205 (2d Cir. 1972), *cert. denied*, 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed. 2d 147 (1972) 35, 52

In re Fleishcher, Schultz, and Schwimer, D-11/12/13, slip op. (Supreme Court of N.J. May 28, 1986) 35, 52

Florida Bar v. Rubin, 362 So. 2d 12 (Fla. 1978) 56

PAGE NO.

Foldi v. Jeffries, 93 N.J. 533 (1983) 42

In the Matter of Leroy C. Gipson, D-74, slip op. (Supreme Court of N.J. June 17, 1986) 40

In re Gross, 67 N.J. 419 (1975) 34

In re Hennessy, 93 N.J. 358 (1983) 45, 46

In re Hinds, 90 N.J. 604 (1982) 58, 59

In re Hollendonner, 102 N.J. 21 (1985) 45, 47

In re Kallen, 92 N.J. 14 (1983) 52, 53

Laba v. Newark Bd. of Educ., 23 N.J. 364 (1957) 53

Landmark Communications v. Commonwealth, 217 Va. 694, 233 S.E. 2d 120 (1977) *rev'd and remanded*, 435 U.S. 829, 98 S.Ct. 56 L. Ed. 2d 1 (1978) 58

Lepre v. Caputo, 131 N.J. Super. 118 (Law Div. 1974) 36

In re Logan, 70 N.J. 222 (1976) 51, 52

In re Noonan, 102 N. J. 157 (1986) 1, 34, 37, 38, 39, 40, 41, 43, 45

In re Pennica, 36 N.J. 401 (1962) 34

In re Quinn, 25 N.J. 284 (1957) 44

In re Ries, 13 N.J.L. 559 (1944) 52

In re Rockoff, 66 N.J. 394 (1975) 34, 36

In re Ruffalo, 390 U.S. 544, 550, 88 S.Ct. 1222, 20 L.Ed. 2d. 117, 122 (1968), *reh'g den.* 391 U.S. 961, 88 S.Ct. 1833, 20 L.Ed. 2d 874 (1968) 52

In re Sears, 71 N.J. 175 (1976) 35

Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966) 60

State v. Laganella, 144 N.J. Super. 268 (1976) 53

State v. Merski, 437 A. 2d 710 (N.H. 1981) 52

PAGE NO.

State v. Sugar, 84 N.J. 1 (1980) 57, 58, 59

In re Templeton, 99 N.J. 365 (1985) 1, 46

Tessler & Son, Inc. v. Sonitrol Security Systems, 203 N.J. Super. 477 (1985) 42

In re White, 24 N.J. 521 (1957) 43, 44

In re Wilson, 81 N.J. 451 (1979) 1, 34, 35, 38, 43, 45, 59

AMERICAN BAR ASSOCIATION RULES OF PROFESSIONAL CONDUCT

R. 9.32 ..... 47, 48

NEW JERSEY COURT RULES

R. 1:20-10 (a) 54, 55

R. 1:20-11 (g) 42

SUPREME COURT OF NEW JERSEY ETHICS COMMITTEE RULES OF PROFESSIONAL CONDUCT

DR 5-103 16

DR 9-102 5

DR 9-103 (B) 17

DR 9-102 (A) 13

DR 9-102 (A) (2) 13

DR 9-102 (B) (3) 13

DR 9-102 (C) 13

PRELIMINARY STATEMENT

Unlike most of the reported cases involving misappropriation of trust funds, this case does not involve their intentional use for personal purposes, it does not involve compromising the quality of legal services provided to clients, nor does it involve any misconduct which is so "immoral, venal, corrupt or criminal as to destroy totally any vestige of confidence that the individual could ever again practice in conformity with the standards of the profession." *In re Templeton*, 99 N.J. 365, 376 (1985). It does involve, however, a hardworking, caring and talented attorney, whose fault was that at a time when his life was crumbling down around him, he negligently attended to the accounting portion of his practice, while providing good legal services to his clients.

As will be shown, Respondent should not be disbarred as: (1) the Office of Attorney Ethics (OAE) failed to meet its burden of proof; (2) *in re Noonan*, 102 N.J. 157 (1986) controls this case for negligence, not *In re Wilson*, 81 N.J. 451 (1979); (3) Respondent's right to due process has been violated; and (4) If any penalty is imposed, the Court should consider all mitigating factors.

STATEMENT OF THE CASE

The within matter involves a ten count Complaint brought by the Office of Attorney Ethics. Following the initial Complaint, there was a First Amended Complaint, and a Second Amended Complaint. All these Complaints were in turn answered by the Respondent, John M. Skevin, Esq. The Second Amended Complaint maintained all counts contained in the initial Complaint and the Amended

Complaint. The following charges have been made.

Count One—Dodd

In the Dodd case, certain ethical violations are alleged regarding a real estate matter handled for Mrs. Dodd by Mr. Skevin. Mr. Skevin testified that he had a prior relationship with both Mr. and Mrs. Dodd, who were active in the real estate market in the Hackensack area, and who brought real estate investment opportunities to Mr. Skevin's attention.

At the closing of the subject premises known as 409-415 Main Street, Hackensack, New Jersey, Mr. Skevin held $35,000.00 in escrow pending the settlement of certain judgments and liens on the property. The evidence and testimony are quite clear that he released $20,000.00 to the Seller on April 15, 1982 (approximately two weeks after the closing), when he was satisfied that the balance being held was sufficient to cover the liens and judgments involved. He did not obtain the approval of the title company because it was not required. When he determined the amounts owed to the State of New Jersey and the Internal Revenue Service for taxes, he paid off both liens and retained an additional amount to cover any liens which had not yet been resolved. (see rider to closing statement, Exhibit C-23L indicating that 1980 IRS Return had not been filed and therefore tax liability was not yet determined).

Without Mr. Skevin's knowledge, the Dodds had purchased the property intending to "flip it" through a contemporaneous sale. The sale transaction was handled by another attorney, Harvey Anger, Esq., who eventually contacted Mr. Skevin to determine the balance of the monies held in escrow for the Dodds. While Mr. Skevin

was proceeding in an orderly fashion to discharge these liens, the Dodds had to post $10,000.00 to their new Buyer to cover these new liens. Mr. Skevin eventually arranged with Mr. Anger for the transfer of the escrow funds in the amount of $7,654.91 after satisfying the outstanding tax.

Respondent contends that the facts of this case do not give rise to an ethical violation. The Dodd matter raises questions of practice, and those in turn involve questions of judgment. Mr. Skevin was conservative in discharging his duties as escrow agent, ensuring that all of the liens were properly paid and discharged, and holding a reasonable buffer to ensure that he had sufficient funds to discharge the liens. He did not hold an excessive amount of money, nor did he leave his account deficient. He did not need the consent of any other party to release the funds as is evident by the closing statement and attached rider which set forth the terms and conditions of the escrow. The rider specificaly says "John M. Skevin, Esq. shall hold the sum of $35,000.00 in escrow at the time of the closing of title pending settlement of the following:" and then goes on to list the judgments and liens which were known to the parties at the time of closing as well as those which had not yet been determined, such as the tax on the 1980 IRS return. (Exhibit C-23-6).

The complaint also indicates that the deed was not recorded until May 7, 1982 and the purchase money mortgage not recorded until June 4, 1982. Mr. Skevin explained that he employed a secretary who was experienced in real estate closings and who routinely recorded documents in a timely fashion. As he was preoccupied with medical problems and hospitalized shortly after the closing, he as-

sumed that the proper documents were recorded. When Mr. Dodd called to his attention that the deed was not recorded on or about May 7, 1982, he immediately instructed his secretary to do so.

A month later he learned that she had failed to record the purchase money mortgage. He immediately made sure it was taken care of. He speculates that the secretary's lack of familiarity with a purchase money mortgage caused her to fail to recognize it as a recordable document. All of her other closings involved bank mortgages with specific documents and directions from the bank, whereas the purchase money mortgage in this transaction was different since there was no bank involved.

In the report rendered by the Special Master on March 12, 1986, Judge Herbert found that the delay in recording documents for the Dodd closing was not a basis for disciplinary action. Further, he found that proof was lacking that Mr. Skevin unethically caused Mrs. Dodd to participate with her grantee and her grantee's title company in a $10,000 agreement. Payments made by Mr. Skevin as escrow agent were also found to be justified. The Special Master further found that Mr. Skevin improperly used certain monies from his trust account in violation of DR 9-102. (Report of Special Master, March 12, 1986, p. 7-10). It is unclear if the Disciplinary Review Board adopted each and every one of these findings, as the DRB Report merely sets forth Judge Herbert's findings. (DRB Report, May 23, 1986, p.4).

Respondent contends that the Office of Attorney Ethics (hereinafter referred to as OAE) has not met its burden of producing clear and convincing evidence that Mr. Skevin had committed any ethical violation, and there-

fore, based upon the foregoing, he respectfully requests that The Court dismiss this count of the Complaint.

Count Two—Schrader

In the Schrader matter, several facts are alleged to be ethical violations which Respondent claims are not. All of the ethical violations alleged by the father, James Schrader, have been dismissed by the District Ethics Committee and the Disciplinary Review Board, and Fee claims in dispute were decided by the fee Arbitration Committee in Bergen County in favor of Mr. Skevin, awarding him $11,473.55, (Exhibit M-1), the only deduction being approximately $2,300, which the Committee determined to be the obligation of John Schrader. James Schrader filed an appeal, and the Fee Arbitration Committee's decision was upheld.

The essence of this complaint revolves around promises by John Schrader to compensate Mr. Skevin for legal services performed for his parents as well as himself in cases other than *Schrader v. D'amore*. The Schraders are a litigious family, generating more than one dozen law suits in the few years in which they were represented by Mr. Skevin. Some of them were municipal court actions involving disputes with neighbors, and others were significant actions with potentially dire consequences. They were faced with a foreclosure on their home from which they were saved by Mr. Skevin, and a $611,000.00 judgment in the *Sunstar* suit which Mr. Skevin eventually settled without the Schraders having to pay any money. The results in *D'amore* were also extraordinary as the defendant had only $10,000 of insurance coverage. Mr. Skevin's efforts put together a $250,000 settlement from parties whose involvement in the accident was indirect.

This Court should also be mindful of the public vendetta being carried out by the Schraders against Mr. Skevin which has caused him irreparable harm. As evidenced in Exhibit R-1, they have violated the confidentiality of these ethics proceedings by discussing them openly in an August 26, 1984 New York Times article authored by reporter Albert J. Parisi. Since these proceedings commenced, numerous articles about this case have appeared, including, but not limited to, articles in the following papers on the following dates: *The Star Ledger,* June 8, 1984; *The New York Times,* August 26, 1984; *The Bergen Record,* August 13, 1985; *The Star Ledger,* May 6, 1986; *The Star Ledger,* May 31, 1986; *The Bergen Record,* June 1, 1986; *The New Jersey Law Journal,* June 5, 1986; and *The Star Ledger,* June 22, 1986 (All articles Attached as Exhibit A to the August 6, 1986 Affidavit of Mr. Skevin, and also attached hereto). Most of these articles appeared prior to the date this matter was set for oral argument before the Supreme Court (by Order to Show Cause dated May 29, 1986) and contained confidential information and/or interviews with people who were not permitted to speak about this matter, particularly the Schraders. This case has also received television coverage, as set forth in Mr. Skevin's affidavit.

There is a strong suspicion that the Schraders were also involved in the production and distribution of a scurilous leaflet which is also made part of Exhibit R-1 and which has been circulated in Hackensack, the City in which Mr. Skevin resides with his family and where he practices. Fairness and justice would dictate that those who so eggregiously violate the confidentiality of these proceedings should somehow not be rewarded by a decision or penalty

against Mr. Skevin. However, the facts of the case and the evidence before the Court more than amply justify a decision that there has been no ethical violation alleged in Count Two of the complaint.

One of the violations alleged is that Mr. Skevin advanced funds to John Schrader before collecting any monies in settlement of the *D'amore* case. Mr. Skevin acknowledges having advanced $9,050.00 to John Schrader from August 19, 1982 to November 19, 1982 (see Exhibit R-7), and has testified that he believes he was advancing these monies from his own personal funds which he had deposited into the trust account.

The loans were clearly an act of charity. John Schrader had suffered a serious accident which resulted in the amputation of one leg. He became estranged from his family when they disapproved of his marriage, throwing him, his new wife and her child of a previous marriage out into the street. Mr. Schrader was unemployed, had no funds, was living in a motel in North Bergen in the cold of winter, unable to feed or care for his family. Mr. Skevin, being a charitable and sensitive human being, responded to the pleas of John Schrader, and advanced funds to him to be repaid from any recovery in the *D'amore* case. Some of the loans were made after a settlement was struck. (see Exhibits R-6H, I and K).

Another allegation involves a claim that Mr. Skevin failed to provide an accounting and payment of monies due to John Schrader from the aforementioned negligence action. The evidence and testimony indicates that although there was no formal accounting until April 20, 1983 as explained below, there were on-going, significant com-

munications with Mr. Schrader which Mr. Skevin reasonably believed were keeping him informed. Mr. Skevin's testimony and the Affidavit of Jean A. Fostedt demonstrate that John Schrader promptly came to Mr. Skevin's office upon receipt of settlement checks to receive his share. Prior to the settlement, while Schrader was hospitalized from June 20, 1979 to December 22, 1979, invoices and copies of cover letters for disbursements were sent to his parents, Mr. and Mrs. James Schrader. (see Exhibit R-8).

There was obvious confusion since John Schrader lived with his parents at the outset of the case and later separated from them, which could readily explain the mistaken distribution of copies of correspondence intending to keep him informed.

In any event, on April 20, 1983, Mr. Skevin sent to John Schrader a full accounting of what had been received and disbursed in the *D'amore* case, and what Mr. Skevin had taken as payment for various other cases pursuant to his agreement with the Schrader family, including John. (See Exhibit R-15). Mr. Skevin explained that the delay was caused by the time required to go through each of these files and compute the fees and disbursements. His behavior was reasonable under the circumstances, and should not be construed as an ethical violation. Given the multiplicity of suits and the voluminous filed described by Mr. Skevin, providing a final accounting on April 20 after making his last disbursement on January 25 was not an unreasonable delay.

In any event, all of John Schrader's claims against Mr. Skevin were finally settled on August 3, 1983 by the

$14,000.00 payment to Schrader and the exchange of releases between the parties. It is important to note that Mr. Schrader was represented by counsel, Eugene Callahan, Esq., and the release clearly covers any and all claims for proceeds due Mr. Schrader from the *D'amore* case and any claims contained in the ethics complaint against John Skevin which is the subject of this count. (Report of Special Master, March 12, 1986, p. 16).

Another allegation contained within this Count involves John Skevin signing the name of John Schrader to a check issued by the Superior Court pursuant to the Order of Judge Benedict Lucchi in the amount of $59,179.37. Said Order provided that the monies deposited with the Court by one of the defendants was to be made payable to John M. Skevin, an attorney for John Schrader. Due to a clerical error, the check was made payable to John Schrader. Mr. Skevin admits signing John Schrader's name with John Schrader's authorization, but Mr. Schrader denies giving such authorization. Since the check was to have been made payable to Mr. Skevin, he could have returned same to the Clerk of the Superior Court to have the same replaced with a check as per the Order of Judge Lucchi, but this would have delayed disbursement of the proceeds.

The facts of the case would tend to support Mr. Skevin's position. As evidenced by Exhibit R-8, Mr. Schrader was anxious for receipt of funds and asked that Jean Fostvedt call him whenever she received a draft so that he could arrange to have his share picked up, rather than waiting for it to be mailed to him.

Mr. Skevin's testimony that John Schrader was disabled on that particular day and authorized him to sign

his name and deposit the check is perfectly credible. The fact that John Schrader would occasionally be disabled and unable to come to the office is reasonable, given the magnitude of his injury. His desire to receive funds rapidly makes it logical to expect that he would authorize Mr. Skevin to sign his name to deposit the funds so that Mr. Skevin could in turn draw a check and send it to him. As evidenced by Exhibit R-7, Mr. Skevin sent Mr. Schrader a check in the amount of $15,000.00 on January 12, 1983, just five (5) days after it was issued by the Superior Court, approximately the minimum time necessary for a check to be deposited and cleared before funds could be disbursed against it from the trust account.

Another allegation in this Count involves Respondent's withdrawal from his trust account of $38,500.00 prior to November 22, 1982 by a series of nine (9) checks which were designated as partial fees or costs in the negligence action. The complaint further alleges that the withdrawals were without the apparent consent of any other client of the Respondent. Mr. Skevin testified that he made these advances from what he believed to be his own personal funds, and expected to reimburse himself from the proceeds to be received within a short period of time from the settlement already struck in the *D'amore* case. The evidence introduced by the OAE supports this position and is reflected in Exhibits C-24E through M, all of which were made in November, 1982, after the settlement was struck in Court and a few days before the receipt of the first check on November 22, 1982.

Although this is a questionable procedure, it is not a violation of disciplinary rules to advance your own funds

to yourself, which is what Mr. Skevin believed he was doing.

Respondent admits that there was no written agreement between himself and the Schraders for payment of fees for other law suits from the proceeds of the negligence action. However, that matter has now been settled between Mr. Skevin and John Schrader as set forth in Paragraph 22 of the Stipulation of Facts (See J-1). The claims between Mr. Skevin and Mr. and Mrs. James Schrader went before the Fee Arbitration Committee, which awarded $11,473.55 to Mr. Skevin. (Exhibit M-1).

The Special Master concluded that loans to Schrader constituted unethical conduct for which a private reprimand would be adequate discipline. The Special Master also noted that the deposit of Respondent's personal funds in his trust account was contrary to DR 9-102(A), withdrawal of funds prior to settlement was a violation of DR 9-102 (A) (2), maintenance of complete records in compliance with DR 9-102 (B) (3) was not followed, and proper record keeping in compliance with DR 9-102 (C) was not maintained. (Report of Special Master, March 12, 1986, p. 19-20). The report of the Disciplinary Review Board reiterated these findings, without commenting on their validity. (DRB Report, May 23, 1986, p. 7).

Based upon the foregoing, Count Two of the Ethics Complaint should be dismissed as the OAE has not proven clearly and convincingly that Mr. Skevin is guilty of any ethical violation.

Count Three—Onello

The facts of this Count involve a real estate transaction wherein Mr. Skevin was a partner with Joseph Onello

and also was the attorney representing the partnership in the purchase of a store known as 116-122 Main Street, Hackensack, New Jersey. At the closing on March 5, 1982, Respondent received and held the sum of $10,000.00 in his trust account as escrow agent for the purpose of satisfying, *inter alia* alleged franchise taxes due from the sellers to the State of New Jersey. As is evidenced by the closing statement, Exhibit C-25A, Mr. Skevin had a responsibility to see that the sellers satisfied payment of the franchise taxes. But, it was quite clear that the responsibility for payment was on the sellers. This appears to be reflected in the correspondence between Joann Onello, Esq. and Mr. Skevin's Associate on March 23, 1983. (see Exhibit C-25I).

As indicated in the Stipulation, Mr. Onello bought out Mr. Skevin's interest shortly after the closing. He had difficulty in transferring title a year later when he was represented by his daughter, but that was not the fault of Mr. Skevin. The fact that the sellers had not yet discharged the liens was beyond Mr. Skevin's control. It was not until October 10, 1983 that Mr. Skevin received adequate notice permitting him to release his funds when he received a letter from James E. Mackevich. (see Exhibit R-16).

There were admittedly problems in communication during that year between the Respondent and Mr. Onello, but the Respondent thought he was discharging his responsibility by communicating with Mr. Onello's daughter. Mr. Skevin's position is supported by Exhibit C-25I. These problems in communications gave rise to Mr. Onello's filing of his ethics complaint on April 29, 1983, but he obviously regretted that act when he withdrew the complaint one month later on June 1, 1983. (see Exhibit R-17).

The facts of this Count demonstrate a misunderstanding between business partners and a lack of understanding on the part of Mr. Onello as to the duties and responsibilities of an attorney when he acts as an escrow agent. Mr. Skevin had the obligation of holding certain documents as well as funds in escrow until certain conditions were satisfied, and Mr. Onello's impatience to the contrary, Mr. Skevin appears to have adequately discharged his fiduciary responsibilities. There appears to be no basis for a finding that there was an ethical violation on the part of Mr. Skevin with regard to Count Three, and the Count should be dismissed.

Judge Herbert held that "[t]he Third Count of the Amended Complaint, incorporated by reference as Count Three of the Second Amended Complaint, should be dismissed. (Report of Special Master, March 12, 1986, p. 22). The Onello matter was also covered by Count Four as well, and the Special Master concluded that money held in the escrow fund was used for purposes other than those for which it was intended. (Report of Special Master, March 12, 1986, p. 23; DRB Report, May 23, 1986, p. 8).

Count Seven—Santana

The Santana case is another matter involving Mr. Skevin's extraordinary generosity and caring for his fellow man. Mr. Santana, a young man of Puerto Rican descent, was a stranger in this country who was without funds, food, or shelter. Mr. Skevin responded to his desparate situation by lending him money, and as Mr. Skevin testified, if he had not recovered anything for Mr. Santana in the negligence action, he would have forgiven the loan. ("T105-24" through "T106-5", 7/12/85).

Mr. Skevin was not the attorney of record, the matter being handled by another attorney in New York where the accident occurred. Since DR5-103 only applies to attorneys while representing a client in connection with pending litigation, it's questionable whether the facts of this case even apply to Mr. Skevin, who was the referring attorney and not the attorney of record.

Here again, as in the Schrader matter, Mr. Skevin should not be penalized for his acts of charity by being cited for an ethical violation, and the Court should hold in Mr. Skevin's favor, and dismiss this Count.

Both the Special Master and the Disciplinary Review Board concluded these actions violated DR5-103 (B), and the DRB did not contradict the Special Master's conclusion that private reprimand would be adequate discipline for this conduct. Moreover, no trust account funds were involved. (Report of Special Master, March 12, 1986, p. 29; DRB Report, May 23, 1986, p. 8).

Count Eight—Ferraro and Direnzo

The gravaman of this Count is that the Respondent failed to advise Ms. Ferraro that she had the opportunity to retain him on either an hourly basis or a contingency basis. She had filed an ethics complaint against him alleging misrepresentation and improper withdrawal as counsel. This matter was heard by the District II-B Ethics Committee, which dismissed all charges.

Mr. Skevin testified that Ms. Ferraro was a CETA worker in the Lodi Municipal Building working for minimum wage. He knew her through his political contacts with the elected officials in Lodi, Mr. Skevin being the State Senator representing that town.

Mr. Skevin further testified that he never undertook representation of Ms. Ferraro, as he considered her allegations frivolous and advised her that she did not have a cause of action which would permit him to file a complaint.

In the *Direnzo* matter, we have a similar set of facts. The Direnzos obviously could not afford to pay an hourly charge, and talking to them about the alternative of a contingency fee versus an hourly charge was a complete waste of time.

The OAE has failed to sustain the burden of providing clear and convincing evidence to the court to support the allegations regarding Ferraro and Direnzo, and clearly that the allegations in Count Eight, paragraphs 1 through 6, involving both Ferraro and Direnzo were de minimus. The Special Master concluded that Count Eight of the Second Amended Complaint should be dismissed. The DRB did not contradict this conclusion. (Report, Special Master, March 12, 1986, p. 29).

Count Eight—Brennan vs. A & P

This matter appears settled as Mr. Louis Brief rechecked the calculations made by the OAE in Exhibit C-32W and found that the amount paid by Mr. Skevin to the Brennans in the aforementioned matter was in fact correct. (See Exhibit C-32-X).

Mr. Skevin testified that he and his accountant went back and recalculated the accuracy of fees taken in cases raised by the Disciplinary Review Board, and where they found errors corrections were made. This was one of those cases, but Mr. Skevin testified that the errors were

inadvertent. As explained above, Count Eight was dismissed.

Count Eight—Gruia vs. Buccola

The testimony in this matter is not clear. The OAE provided calculations showing an overcharge. Mr. Skevin's accountant, Bruce Butzel, has also reviewed the figures, and is in agreement regarding the overcharge but disagrees as to the amount. All monies owed have been sent to the Gruias. The Court should not that there was an initial check on the calculation of the fees made in May 1984, and as a result, an error was discovered. Mr. Skevin sent Mrs. Gruia a check for $668.02 to correct the error on May 16, 1984. A copy of the cover letter and check have been submitted to the Court; it was marked into evidence as Exhibit R-29. As explained above, Count Eight was dismissed.

Count Nine—Lieb

The allegations contained in Count Nine, Paragraph 2 involve the dishonoring of checks on two occasions by a bank drawn on Mr. Skevin's general business account. Since an overdraft on a general business account is not an ethical violation, this Count should be dismissed.

Count Nine—Wicks

The allegations in Count Nine—Paragraph 13 involve funds the Respondent was holding in the Matter of the Estate of Wicks. A check drawn by Mr. Skevin was returned for insufficient funds, and he replaced it, satisfactorily. The OAE was unable to provide proof that the check was drawn on a trust account, and therefore, did not meet its burden of providing clear and convincing evi-

dence that there was a violation of any ethical rule. Respondent moved to dismiss this Count on the aforementioned basis, and Judge Herbert granted Respondent's motion and dismissed Paragraph 13 of Count Nine.

At the hearing, items (7) through (11) of paragraph one of Count Nine were dismissed, as were paragraphs 8 through 12. (Report, Special Master, March 12, 1986, p. 30). The DRB did not address this point.

Counts Four and Six: Missappropriation and Comingling

Count Four alleges that the Respondent knowingly misappropriated clients' trust funds in 1982 and 1983. The OAE alleges a misappropriation totalling $181,080.00 (Count Four, paragraph 4), and that Respondent was "out of trust $147,914.08 as of December 31, 1982 and $15,741.89 as of December 31, 1983". (Count Four, paragraph 5). The OAE has failed to present clear and convincing evidence that Respondent's actions were done knowingly and intentionally, nor did they prove the allegations in paragraphs 4 or 5.

The facts amply prove that the Respondent failed to employ proper bookkeeping procedures resulting in substantial mistakes. However, the record is devoid of clear and convincing evidence that he knowingly and intentionally took clients' trust funds for his own use. He believed that he had sufficient personal funds to cover advances made to himself (see Exhibit C-10) and relied upon his bookkeeper or the bank to advise him if there were insufficient funds.

The bookkeeper, on the other hand, was doing all she could do to keep up her secretarial and bookkeeping duties as the practice expanded, and it appears that she per-

formed her duties without consulting Mr. Skevin so long as checks were not being returned by the bank. In short, she delivered checks to Mr. Skevin for his signature, upon his request, and he signed them. He believed that there were proper funds to cover these checks, and she did nothing to contradict that belief.

It is easy in retrospect to analyze the facts and decide that such a "hodgepodge" bookkeeping system could not have gone on for two years without the Respondent knowing what was happening; however, as we analyze the testimony and evidence in the record, it becomes easier to understand and Mr. Skevin's testimony becomes more credible.

First let's look at the testimony of the OAE's main witness, Louis Brief, CPA. His primary analysis is embodied in Exhibit C-8. That document is offered, *inter alia,* to prove the allegations in Paragraph 5, Count Four, that Respondent was out of trust $147,914.08; however, Mr. Brief testified that Exhibit A-1 attached to C-8 does demonstrate that Respondent is not out of trust. Instead, it shows a debit balance of that amount which Mr. Brief described as being "overdrawn" in Respondent's checking account.

Even the accuracy of that testimony is subject to serious question. For example, in Exhibit A-1 attached to C-8, we see a debit balance of $1,334.00 for the case of *K. Colondo v. Rennie Metal.* According to Mr. Brief's testimony, this means that Mr. Skevin wrote checks exceeding deposits by that amount. If we look at the underlying documentation, that does not appear to be the case.

The ledger sheet showed a balance at the beginning of 1982 of $12,784.00 with two disbursements, check number

807 on February 2, 1982 to Royal Insurance in the amount of $10,984.00 and check number 808 on February 2, 1982 to Excelsior Insurance Company in the amount of $1,800.00 for a total of $12,784.00, leaving a zero balance. (see Exhibit C-35A, C-35B).

Similarly, the *DeSimone v. DeRosa* case shows a credit balance of $104.26 but the ledger sheet shows a zero balance (see Exhibit C-37-A); *DeVito v. Shop Rite* shows a credit balance of $4,359.75 but the ledger sheet shows a zero balance (Exhibit C-38-A), as does *Dorns v. Ryan* (Exhibit C-39-A).

In the Estate of Auguste Flynn, there appears a debit balance of $578.97 from the original ledger sheet (Exhibit C-42-A), but an examination of a corrected ledger sheet (Exhibit C-42-B) indicates that a balance of $10,487.08 was not included, and the actual balance should have been zero. The same appears to be true for *Kearney v. Bergen Pines* where the original ledger sheet was in error and the correction showed a balance forward of $6,500.00 resulting in a zero balance and not a debit balance of $2,250.00 as reflected in C-8.

Kullsya v. LaRusso shows a debit balance in C-8 of $311.67, but the ledger sheet shows a zero balance. (see Exhibit C-51-A). The revised ledger sheet does show that balance (Exhibit C-51-D), but Mr. Brief testified that when he prepared C-8, he only had the original ledger sheets.

In the *matter of Lucy Quintero,* C-8 shows a debit balance of $22,048.46. If we look at the ledger sheet, we find that it is a credit balance for the same amount at the end of 1981, not 1982. (Exhibit C-68-A), and a zero balance at the end of 1982. (Exhibit C-68-B).

The ledger sheets originally used by Mr. Brief to prepare C-8 were not created contemporaneously with the transactions set forth therein. They were created retroactively in the summer of 1983 by Nancy Cloonan, Mr. Skevin's bookkeeper in response to the OAE's request. There were obvious errors, relied upon by Mr. Brief, which necessitated her redoing many of the sheets, thereby demonstrating that the factual basis for many of the allegations made by the OAE were premised upon inaccuracies.

Recognizing the substantial errors on the face of C-8, and the fact that it is based upon inaccurate underlying documents, one must conclude that the validity of C-8 is insufficient to meet the OAE's burden of clear and convincing evidence with regard to its allegations in the Complaint.

The Respondent does not deny the allegations in Count Six in that he did commingle over $1,000,000.00 of his personal funds between 1981 and 1983 in his trust account with funds of his clients. The OAE attempted to show that these funds were insufficient to cover advances Respondent made to himself in anticipation of receipt of proceeds from cases on behalf of clients; however, an analysis of Mr. Brief's testimony makes it easier to understand why Mr. Skevin believed he was covering these advances with his personal funds.

Mr. Brief took deposits from Exhibit C-10 and disbursements from Exhibit C-104A and compared them for the years 1981, 1982 and 1983. He came up with an aggregate total for 1981 through 1983 of $1,752.52 overdisbursed, (more money spent than was deposited). Upon cross-examination, Mr. Brief admitted that $87,000.00 in checks

set forth in C-104A were without notation, and he assumed they were disbursements to Mr. Skevin personally. However, he could not conclusively state whether the disbursements were for personal or business purposes. He also admitted not counting certain adjustments to C-10 for deposits actually made in 1983 which could be anywhere from $90,000.00 to $120,000.00. Assuming that the adjustment of C-10 is $90,000.00, Mr. Brief admitted that there could be as much as $175,000.00 more in deposits than disbursements over the period 1981 through 1983.

If Mr. Brief with the assistance of the OAE could arrive at such conflicting conclusions, despite the fact that he had been analyzing these accounts for almost two years, it is not too difficult to understand how Mr. Skevin could have become confused and believed that he had sufficient personal funds to cover advances to himself. (See Testimony of Louis Brief, "T3-1 et. seq.," July 15, 1985; "T2-7" to "T74-8," July 16, 1985).

The testimony of Nancy Cloonan adds some pieces to the puzzle. She corroborates Mr. Skevin's testimony that there was no accounting of the trust account, not even a monthly reconciliation of the bank statements. She did not check to see if funds were received for a specific file before preparing a check against a client account, nor did anyone else in the office perform that task.

She alone computed fees and disbursements and advised Mr. Skevin, who did not check her work. She also admitted occasionally writing out checks for payroll or bills when the Respondent was not available.

She also supported Mr. Skevin's testimony that he was out of his office each day for substantial periods of time for trials, politics, or business.

She testified that she checked the trust accounts as of March 20, 1984 and found them to be essentially in balance with all clients' claims satisfied except for a small difference of a few hundred dollars in the New Jersey Bank trust account. (see Exhibit R-19).

Regarding the bookkeeping and accounting procedures, Respondent would summarize as follows. Mr. Skevin was a single practitioner for many years. He had a small local practice in Oradell, and the level of financial activity was such that he was able to do all of his own accounting including the preparation of his tax returns. He was typical of many single practitioners throughout the state who use a "checkbook accounting method" without any additional records.

In 1973 he was elected to the State Senate, and over the next few years, his practice experienced extraordinary growth. He added associates and secretaries, but never changed the bookkeeping system or its level of sophistication.

His public position also brought new business opportunities, and he took advantage of them with his increasing assets which flowed from higher income.

He was re-elected to the Senate in 1977 and was sitting on top of the world. He was appointed Vice Chairman of the Senate Judiciary Committee and Chairman of the Cancer Study Commission. He was making more money than he ever dreamed of, and he started to build a substantial real estate portfolio.

The 1980's proved to be as bad for Mr. Skevin as the 1970's were good. He lost his bid for re-election in

1981, and just as rapidly as his practice had expanded, it started to contract. Furthermore, his business and professional problems were compounded by serious personal and health problems.

After 24 years of marriage, he separated from his wife in 1978 and went through a bitterly contested divorce culminating in 1981. The results of the divorce were devastating, as Mr. Skevin became totally estranged from three of his five children, and has not spoken to any of them from the date of his separation to the present.

He developed back problems prior to his separation due to a herniated disc which was compounded by the stress of his personal life. This condition caused him to be hospitalized for several weeks at a time and placed him under medication which included muscle relaxants and tranquilizers. We would submit to the Court that the sedation which Mr. Skevin required for this problem also contributed to his inability to focus on all aspects of his practice.

He experienced a number of other illnesses including prostatitis, skin cancer on his face (melanoma), a growth on his foot, and a cold nodule on his thyroid, necessitating the removal of two-thirds of his thyroid gland. (See Exhibits R-21, R-22, and R-23 for details). Shortly after his separation, he learned that his sister had been hospitalized and would have to be institutionalized for the same mental disorder that afflicted his mother. (His mother was institutionalized when he was quite young, and later diagnosed as a schizophrenic. She eventually died in an institution. He was raised by his father who was at work most of the time.) He became aware that this problem might be

hereditary, and this caused him substantial emotional distress. His worst fears were realized when he learned that his son, John, also suffered from the same mental disorder and is permanently unemancipated. The only other child with whom he has a relationship, his son Robert, developed serious drug problems, and Mr. Skevin had to attend to a host of conflicts with Robert who was in and out of trouble for several years during the same period of time. (Although Mr. Skevin suspected there might be more to Robert's obvious problems, he has only recently confirmed that Robert also suffers from paranoid schizophrenia.)

The devastating psychological affect all of these events had on Mr. Skevin in 1982 and 1983 are set forth in detail in the report of Dr. Allwyn J. Levine, a distinguished psychiatrist who evaluated Mr. Skevin. (see Exhibit R-24). Dr. Levin concludes that Mr. Skevin is a clinically depressed man. He states:

> It is my impression that, because of the multiplicity of intrapsychic stresses, external reality pressures generated by his profession, his elected position, his family problems, his medical problems, and his lifelong pattern of somewhat disorganized bookkeeping practices, an oversight in not keeping separate ledgers could have occurred. Granted, an accountant or bookkeeper should have picked up on these errors, but if Mr. Skevin had not read the Rules of Court and was not apprised of the new requirements for keeping separate ledger sheets, it's easy to understand how these errors could have occurred.

To further examine Mr. Skevin's intent, we offer Exhibit R-25. In the spring of 1983, Respondent received preliminary data on his 1982 Income Tax Returns from

Bruce Butzel. He was surprised and concerned at the substantial overstatement of his earnings. For the first time, he personally analyzed his fees and determined that $133,497.84 in fees were misapplied, artificially inflating his income. The results of his analysis are reflected in his May 19, 1983 letter to Bruce Butzel which is Exhibit R-25.

Mr. Skevin testified that as a result of this analysis, he became aware of a shortage in his trust account for the first time, and commenced immediate steps to restore the funds. This is significant because it occurred prior to the Office of Attorney Ethics ordering an audit of his books and records, and lends credibility to Mr. Skevin's position that he did not knowingly invade his trust account.

He later undertook independent calculation of each file with his accountant to insure that each client received what they were due. This was in fact done and confirmed by his accountant. (see Exhibit R-26).

Mr. McCormick tried to attack Respondent's credibility on the issue of commingling, but Respondent's testimony is credible on that issue. He explained that when he first started private practice in 1967, he experienced a $14,000.00 shortage in a house closing which he made up from his personal funds. To assure that he would never be out of trust, he started the practice of keeping arbitrary amounts of personal funds in his trust account as a buffer against mistakes.

When asked directly whether he ever knowingly used clients' trust funds, he categorically denied ever doing so. The OAE has presented no evidence or testimony to refute that clear testimony by the Respondent. In fact, the OAE

admitted before the DRB that it could not prove Respondent knowingly misappropriated funds. ("T32-25" through "T35-25", April 16, 1986).

In deciding this matter, Respondent believes the Court must consider all aspects of his performance. He has offered into evidence an Affidavit of Raymond F. Flood, Esq. dated July 18, 1985, (Exhibit R-30), who was appointed by the Supreme Court to serve as a proctor for Mr. Skevin on or about July 20, 1984. During the past year, he served as a co-signator on both his regular business and trust accounts, and supervised the general financial affairs of his practice. He was assisted in this endeavor by William Morrison, a certified public accountant, who reviewed Mr. Skevin's accounts on a monthly basis and prepared a monthly report for the Office of Attorney Ethics.

We call the Court's attention to Paragraph 6 of Mr. Flood's Affidavit wherein he concludes that "Mr. Skevin appears to be a competent professional, providing good quality legal services to his clients. Mr. Skevin's legal files appear to be well organized and he obtains good results for his clients which primarily involve negligence actions." We submit to the Court that this has been true throughout Mr. Skevin's practice including the years 1981 through 1983. Although he was derelict in his bookkeeping practices, he did not compromise the quality of legal services provided to his clients, including the Schraders, who enjoyed the benefit of his experience, and obtained good results. This continued to be true over this past year when he was subjected to enormous pressure due to unfair and improper publicity surrounding this matter

which was supposed to be confidential, which publicity has had a devastating effect on his practice.

The publicity has also made him a target for several disgruntled former clients and business associates who sought to take unfair advantage of Mr. Skevin in his current predicament. A pattern has developed where they go to the newspapers first to put pressure on him to settle for more than he would otherwise be willing. Because he was a public figure, the newspapers appear ready and willing to print virtually any story involving his predicament. Needless to say this has caused enormous emotional distress and anguish for him and his family, as set forth in Mr. Skevin's Affidavit of August 6, 1986.

There is an additional policy issue which should be addressed by this Court. Mr. Skevin testified that he never received accounting training in law school or subsequently. There were no courses offered on how to keep a trust account, and his experience is typical of most lawyers. Our State does not require such courses to be taught in law schools, it is not tested on the Bar Exam, it is not taught in the Skills and Methods courses required for licensure, nor is it required as part of the Continued Legal Education program in this State. (see Exhibit R-27). Only recently has the New Jersey Institute for Continued Legal Education offered materials on trust fund accounting in their skills training course. (see Exhibit R-28).

It hardly seems fair for the legal system of our State to provide no training and then deal harshly with those who make mistakes.

POINT I

DISBARMENT IS NOT AN APPROPRIATE REMEDY IN THE CASE AT BAR.

A. *The Wilson Standard If Knowing Misappropriation Has Not Been Met By Clear and Convincing Evidence.*

The landmark case of *In re Wilson,* 81 N.J. 451 (1979), put forth the maxim that in all attorney disciplinary cases where "knowing" misappropriation is proven, the result will almost invariably be disbarment. *Id.* at 453; *In re Noonan,* 102 N.J. 157 (1986). The knowing misappropriation, however, must be established by clear and convincing evidence. *In re Rockoff,* 66 N.J. 394 (1975); *In re Gross,* 67 N.J. 419 (1975).

This standard of clear and convincing evidence has been found to lie somewhere below the "beyond the reasonable doubt" standard of criminal cases yet, above the "preponderance of the evidence" standard of most civil cases. *See, In re Pennica,* 36 N.J. 401, 419 (1962).

The reason for this higher standard is because of what is at stake in disciplinary proceedings. An adverse finding will lead to dire consequences, *Pennica,* 36 N.J. at 419, ranging from loss of reputation to the loss of the attorney's license to earn a living. *See, In re Arndt,* 67 N.J. 432 (1975) (Reasoning that loss of driver's license seriously affects driver's livelihood). This Court, recognizing the clear and convincing standard in *In re Sears,* 71 N.J. 175 (1976), stated that:

> This high standard emphasizes the reluctance which should characterize a decision to impose a disciplinary sanction and the serious consequences which attend such a decision. As a practical matter, such a decision

> limits, if it does not preclude, an attorney's opportunity to practice his chosen profession. We should impose such a restriction only after careful deliberation and only in circumstances which clearly warrant it.

Id. at 197-198.

Similarly, the decision to charge an attorney with knowing misappropriation (which, according to *Wilson,* invariably leads to disbarment) is akin to charging him with a crime. *In re Fleischer, Schultz and Schwimer,* D-11/12/13, slip op. at 10 (dissent) (Supreme Court of N.J. May 28, 1986) (O'Hern, dissenting); *Erdmann v. Stevens,* 458 F. 2d 1205 (2d Cir. 1972), *cert. denied,* 409 U.S. 889, 93 S.Ct. 126, 34 L. Ed. 2d 147 (1972). If disbarment results, the attorney will be permanently deprived of his right to practice law (Reinstatement has occurred only three times in the past 100 years. *Wilson, supra,* at 460, n. 5). Such a deprivation makes disbarment analogous to criminal punishment.

Recognizing this, some courts have held that charges in a disciplinary proceeding must be established "beyond a reasonable doubt." See e.g. *Cushway v. State Bar,* 170 S.E. 2d 732, 120 Ga. App. 371 (1969), *cert. denied,* 90 S.Ct. 1705, 398 U.S. 910, 26 L. Ed. 2d 71, *reh'g denied,* 90 S.Ct. 2256, 399 U.S. 938, 26 L.Ed. 2d 810 (1969) Although these holdings are contrary to the weight of authority, which subscribes to the clear and convincing standard, *See, e.g. Rockoff, supra,* they serve to reiterate an important point: The consequences of a disbarment proceeding are extremely serious and irreversible. Therefore, to warrant disbarment, the unethical conduct—in this case, knowing misappropriation—must be proven *clearly and convincingly,* nearing the point of *beyond a reasonable doubt,* and where

doubt exists, respondent should be given the benefit of the doubt, as set forth later in subpoint B.

The Office of Attorney Ethics must prove knowing misappropriation to the Court by clear, convincing, positive proof, mere inferences and apparent conclusions will not suffice. This burden is imposed on the OAE so that the irreparable result of disbarment "shall not be reached by a mere balancing of doubts or probabilities, but by clear and unequivocal proof of facts . . . " *Lepre v. Caputo,* 131 N.J. Super. 118, 124 (Law Div. 1974) (Discussing the clear and convincing standard in a proceeding reviewing a candidate's election petition.). Therefore, the Office of Attorney Ethics' proof must be such that it

> . . . produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact-finder to come to a clear conviction without hesitancy of the truth of the precise facts in issue.

In Re Boardwalk Regency Casino License Application, 180 N.J. Super 324, 339 (App.Div. 1981), *modified,* 90 N.J. 361, (Casino Licensing Proceeding which defined clear and convincing evidence).

That is not the case here, however, as the evidence in the record clearly demonstrates. The Court need look no further than the admission of the OAE when Mr. McCormick, before the DRB, conceded that he could not prove knowing misappropriation. He stated, "I very candidly, and the Court in that instance, told him, I didn't think I could show knowing misappropriation." ("T32-22" April 16, 1986).

While that quote alone does not make it clear whether Mr. Cormick is discussing the *Noonan* case, or the case at issue, subsequent elucidation clears any discrepancy. On the next page of the transcript Mr. Sokol discusses the issue with Waldron Kraemer, Esq., a member of the DRB, and clearly states, "I think what Mr. Cormick says is exactly true. He could not prove knowing misappropriation because the facts weren't there. Nor can he prove that—what he attempts to portray as a set up, not looking, the blissful ignorance scenario, was done for that purpose." ("T34-22, to "T35-4" 4/16/86). Mr. Cormick did not object to this characterization, which also was accepted by the Board, but merely went on to explain the difference between *Noonan* and *Wilson*. ("T35-13", 4/16/86).

It is this distinction that presents the critical issue in the case at bar.

In *Noonan, supra,* the DRB found that Noonan's personal problems, i.e. alcoholism, extremely heavy workload, and marital problems, affected his ability to practice law, but he subsequently appeared to have "gotten his life together" which lead the DRB to conclude that he was now fit to continue practice under the supervision of another attorney. *Id.* at 159. The DRB further agreed with the District Ethics Committee's conclusion that there is no evidence presented indicating that the respondent intentionally defrauded his clients. This Court then went on to find that mitigating factors outweighed the offenses, concluding that respondent's misconduct was not based on dishonesty, venality or immorality, nor did his conduct lead to a conclusion that his good character and fitness have been permanently or so irretrievably lost as to warrant

disbarment. *Id.* Finally, the DRB pointed to his prior good record and reputation and contrition, and that there was full reimbursement to two clients whose funds were taken.

Just as *Noonan* stands for the proposition that disbarment is invariable, regardless of excuse, when there has been knowing misappropriation, it also stands for the proposition that when misappropriation has not been knowing, but has been negligent, disbarment is not appropriate, and some lesser penalty should be imposed. Furthermore, *Noonan* suggests that the penalty should take into consideration mitigating factors. *Noonan, supra,* at 161.

In this case, the OAE could not prove knowing misappropriation, by their own admission. A comparison of the facts of *Noonan* with those in *Skevin* make that conclusion more apparent. Noonan's marital difficulties, heavy workload, and drinking problem pale by comparison to Respondent's problems. Mr. Skevin's marital difficulties completely estranged him from three of his five children, and of the other two children, one was diagnosed as a paranoid schizophrenic making him permanently disabled, and the other was a drug addict in constant trouble. His sister was also diagnosed as a paranoid schizophrenic, confirming the fact that this was a heredital problem. (This was the disease that afflicted and eventually killed Mr. Skevin's mother while he was still an infant, and now permanently disabled his sister and sons.) In addition to his rapidly growing practice collapsing when he lost his bid for re-election in 1981, he simultaneonsly experienced significant medical problems including a debilitating back problem which often left him crippled for weeks at a time,

skin cancer, and a thyroid problem resulting in surgery to remove two-thirds of his thyroid gland.

These numerous personal tragedies suffered by Mr. Skevin support his contention that his state of mind was such that he was unaware of the shortages in his accounts. It is easy to understand that he was so distracted that he paid no attention to his accounts unless someone called a problem to his attention, which they did not.

The case of *In the Matter of Leroy C. Gipson,* D-74, slip op. (Supreme Court of N.J. June 17, 1986), recognized that external factors, such as the rigors of practice and severe psychological strain, might "bear upon respondent's ability to formulate the state of mind necessary to encompass a knowing misappropriation of funds . . . ". In that case, the Court implied that judgment of criminal conviction was proof positive of the necessary state of mind to find knowing misappropriation. *Gipson,* slip op. at 3. In this case, however, there is no criminal conviction to foreclose the consideration of these factors as evidence that Mr. Skevin could have been distracted to the point where he did not knowingly misappropriate funds. Any reasonable analysis of these facts compared to *Noonan* would lead one to conclude that the distractions on Skevin were far greater, making his lack of knowledge for his acts more credible.

Furthermore, although Respondent suffered staggering tragedies, he continued to provide quality legal services for his clients. The respondent in *Noonan* did not, yet the Court did not disbar him. By comparison, Mr. Skevin's only failure was in the bookkeeping aspect of his practice.

This Court has held that "it is the mere act of taking your client's money knowing that you have no authority

to do so that requires disbarment". *Noonan, supra* at 160. Skevin has produced credible evidence that he did not know that he was taking his clients' money. Despite the fact that the balances were oftimes low, his course of conduct over several years of depositing his own personal funds and combining with trust funds to insure proper balances, and the absence of notice of deficiencies from his bank, is sufficient to support his allegations that he did not know. The OAE produced no evidence of the contrary, nor could they disprove this long term course of conduct.

The fact that he experienced a trust account outage when he first started the practice in 1967, and thereafter maintained the practice of depositing personal funds in his trust account, lends greater credibility to his position.

In summary, if the respondent in *Noonan* did not knowingly take clients' trust funds, neither did Skevin, because the weight of evidence in support of Skevin's position is greater than that in *Noonan.*

Contrary to the analysis set forth in *Noonan,* the DRB in Skevin's case stated that, "professed ignorance . . . will, in the future, be viewed skeptically as an excuse for imperiling the integrity of client trust funds." (DRB Report, May 23, 1986, p. 20). If the reasoning of the DRB is followed, it will represent a substantial departure from current law, and a reckless disregard for the due process rights of attorneys who come before them for discipline.

The DRB wants to create a presumption of guilt because "professed ignorance" could be used as a convenient excuse by attorneys to avoid being held as *knowingly* misappropriating trust funds; however, the law provides

that the burden is on the OAE to prove knowing misappropriation by clear and convincing evidence; i.e. the attorney is innocent until proven guilty. *R.* 1:20-11(g).

Furthermore, the DRB's position that it would be difficult to analyze the facts of each case to prove knowing misappropriation is a virtual indictment of our judicial system and an abandonment of their responsibilities. Anglo-Saxon Jurisprudence has long recognized gross negligence as a distinct standard, *see, Coggs v. Bernard,* 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1704); and New Jersey Courts have recognized the distinction between gross negligence and willful, knowing conduct. *Cohen v. Press,* 31 N.J. Super. 45, 50 (1954); *Foldi v. Jeffries,* 93 N.J. 533, 549 (1983); *Tessler & Son, Inc. v. Sonitrol Security Systems,* 203 N.J.S. 477, 484 (1985); *Accord, Draney v. Bachman,* 138 N.J.S. 503, 513 (1976); *Brogan Cadillac, etc. v. Central Jersey Bank & Trust,* 183 N.J.S. 333, 337 (1981). For the DRB to claim that they are unable to distinguish between knowing conduct and gross negligence while our Courts have been able to deal with the problem for almost 300 years, is a specious argument that should be summarily rejected by this Court.

In summary, *Wilson* requires a "knowing" use of client money as if it were the attorney's own. *Wilson, supra,* at 453. As set forth, the OAE has failed to prove Mr. Skevin's actions were "knowing" and has admitted such lack of proof. This case should therefore be judged by the standards set forth in *Noonan,* wherein the Court held that gross negligence is not sufficient grounds for disbarment. *Noonan,* 102 N.J. at 160-161. For these reasons, *Wilson* does not control and *Noonan* indicates that

if a penalty is to be imposed upon Mr. Skevin, it must be one other than disbarment.

B. *All doubts must be resolved in favor of the Respondent.*

If there is any doubt that Mr. Skevin acted without knowing he was misappropriating clients' trust funds due to the distractions he faced, that doubt must be resolved in favor of Respondent. In 1957, an attorney was accused of improperly using settlement funds. *In re White,* 24 N.J. 521 (1957). The Court reviewed all circumstances and testimony in that case and concluded that, "[a] careful examination of the testimony leaves us in doubt." *Id.* at 524. The Court held that the doubt was heightened by the respondent's record of 19 years of practice without a blemish. The Court concluded that, "Respondent is entitled to the benefit of that doubt." *Id.*

Later that same year, the Court again examined an attorney ethics proceeding. In that case, the crucial factual determination concerned what the attorney believed the value of a piece of property. *In re Quinn,* 25 N.J. 284, 291 (1957). The value of the property was the figure upon which the contingent fee in that case would be based. In evaluating the *mens rea* of the attorney, the Court held, "[t]he situation perhaps is not free from some doubt, but even so the doubt must be resolved in respondent's favor." *Id.* at 291.

It is clear from *White* and *Quinn* that any doubt as to whether Mr. Skevin acted negligently and did not knowingly misappropriate funds must be resolved in his favor. This case is more compelling than *White.* Prior to the within action, Mr. Skevin has practiced without a blemish

on his record since his admission to the bar in 1956. Moreover, he has a long record of distinguished public service. This heightens the doubt that must be resolved in his favor. *White, supra.* at 524. That he suffered staggering tragedies, that neither Respondent in *White* nor *Quinn* were subject to, casts further doubt on the accusation that his acts were knowing. These doubts must also be weighed in Respondent's favor.

C. *Disbarment is not the property penalty in the case at bar, and mitigating factors should permit Respondent to continue to practice.*

In the case at bar, in the absence of clear and convincing proof of knowing misappropriation, the penalty of disbarment should be rejected. This is what *Noonan,* as previously discussed, and other recent cases have made clear.

In re Hollendonner, 102 N.J. 21 (1985), involved an "appalling" disregard of proper record keeping procedures and the misuse of escrow funds which the Court recognized as an analagous to client trust funds, noting " . . . an attorney fund to have knowingly misused escrow funds will confront the disbarment rule of *In re Wilson* . . . " (citations omitted). However, the court did not apply the *Wilson* rule "in view of the absence of clear and convincing evidence that respondent invaded the escrow funds with the knowledge that the use of funds is improper." Instead, they imposed a one-year suspension. *Id.* at 28-29.

In re Hennessy, 93 N.J. 358 (1983), involved a finding that " . . . respondent's problem stems from flagrant

record keeping errors combined with an apparent lack of comprehension of the proper operation of an attorney's accounts." The Court independently concluded that the record did not clearly and convincingly show that respondent used the funds for his own or any improper purpose, and imposed a public reprimand. *Id.* at 360-61. In the case at bar, the OAE provided no evidence of Respondent's use of trust funds for any improper purpose.

These three recent cases, all factually similar to the case at bar, evidence that knowing misappropriation must be clearly and convincingly established to warrant the penalty of disbarment, a sanction so severe that it must only be

> . . . reserved for the case in which the misconduct of an attorney is so immoral, venal, corrupt or criminal as to destroy totally any vestige of confidence that the individual could ever again practice in conformity with the standards of the profession.

In re Templeton, 99 N.J. 365, 376 (1985).

Clearly, such is not the case in this instance. The evidence is in fact to the contrary. Should Respondent be permitted to practice law, there is every indication he would conform to the standards of the profession. As set forth in Mr. Flood's Affidavit (R-30), Mr. Skevin continues to render competent legal services to his clients. For this reason, disbarment is too severe a penalty to impose.

Recent cases have also shown that in the absence of proof of knowing misappropriation, the court is willing to consider mitigating factors in determining the appropriate disciplinary action. *In re Cornish,* 98 N.J. 500

(1985). In *Cornish*, the Court found less than knowing misappropriation, and considered as mitigating a " . . . doctor's opinion that the respondent was a basically honest person who succumbed to overwhelming psychological pressures . . ." which had impaired respondent's reasoning. *Id.* at 512. The court stated that, " . . . mitigating factors may warrant a discipline less than disbarment." *Id.* at 511.

The DRB in *Hollendonner* recognized mitigating factors in determining the appropriate sanction. Among these factors were the respondent's prior history of no disciplinary action, his admission of wrongdoing, his corrective steps to bring his records into compliance with the rules, and his activity in the community, both politically and professionally, *Hollendonner, supra*, at 27, all applicable to Mr. Skevin.

Furthermore, as set forth in the model standards for imposing lawyer sanctions *R.* 9.32, adopted by the American Bar Association in February of 1986 (ABA/BNA Lawyer's Manual on Professional Conduct 01:842):

> 9.32 Factors which may [be] considered in mitigation.
>
> Mitigating factors include:
>
> (a) Absence of a prior disciplinary record;
>
> (b) Absence of a dishonest or selfish motive;
>
> (c) Personal or emotional problems;
>
> (d) Timely good faith effort to make restitution or to rectify consequences of misconduct;
>
> (e) Full and free disclosure to Disciplinary Board or cooperative attitude toward proceedings;
>
> (f) Inexperience in the practice of law;
>
> (g) Character or reputation;

(h) Physical or mental disability or impairment;

(i) Delay in disciplinary proceedings;

(j) Interim rehabilitation;

(k) Imposition of other penalties or sanctions;

(l) Remorse;

(m) Remoteness of prior offenses.

Model Rules of Professional Conduct, Rule 9.32 (Adopted 1986).

Mr. Skevin has undergone a variety of personal tragedies as are fully set forth in the record and previously herein, which briefly include a painful divorce, alienation from his children, the commitment of his sister to a mental institution, the diagnosis of his son as being schizophrenic (indicating a hereditary family problem), drug problems by another son (later diagnosed as also being schizophrenic), removal of a portion of his thyroid, back problems, skin cancer (melanoma), and loss of his public office.

Mr. Skevin has practiced under a proctor since this court's order. As Mr. Flood's Affidavit (R-30) shows, Mr. Skevin is a competent practioner and renders high quality services to his client. There is no indication he will repeat his negligent bookkeeping practices, as his own Affidavit of August 6, 1986 shows, and he is willing to enter into a practice where he will have no financial or bookkeeping responsibilities.

Mr. Skevin has repaid all the funds due and owing to his clients and has suffered irreversable and irreparable damage professionally, financially, and personally by the premature press coverage of this case which effectively negated his ability to practice during the past two years,

and eggregiously deprived him of his right to due process. (See Point II, *infra*). As set forth in his affidavit, what was a flourishing four-man practice has now become a one-man practice with his wife as his only secretary. Additionally, he has shown himself to be repentent.

The mitigating factors in the case at bar are overwhelming, from the numerous personal tragedies suffered by Mr. Skevin, to his prior unblemished record, to his subsequent compliance with the record keeping procedures, to the damages he has already suffered. The failure to consider this plethora of evidence would be to unfairly ignore the particular circumstances of this case, thereby judging Mr. Skevin without regard to the real-life factors which affected his conduct. These factors were explained in the affidavit of Dr. Levine (Exhibit R-24).

The facts of this case call for a lesser penalty than disbarment, and taking mitigating factors into consideration, Mr. Skevin should be allowed to continue to practice.

POINT II

THE VIOLATIONS OF THE CONFIDENTIALITY RULE ARE VIOLATIONS OF MR. SKEVIN'S RIGHT TO DUE PROCESS AND SUCH A BLATANT AFFRONT TO THE INTEGRITY OF THE COURT, THA HIS CASE SHOULD BE DISMISSED OR ANY PENALTY IMPOSED MITIGATED.

(Not considered below)

Courts across the United States differ in their views as to whether an attorney disbarment proceeding is a criminal or a civil procedure. The New Jersey Supreme Court has held that it is neither civil nor criminal, but *sui generis*.

In re Logan, 70 N.J. 222, 227 (1976). The Court explained at length:

> But the proceeding is not criminal in nature. It is an exercise of the summary disciplinary jurisdiction of this Court over attorneys and counsellors, as officers of the Court. *Strong and Sons v. Mundy*, 52 N.J. Eq., 833. It is civil in character, or perhaps, it is more accurate to say it is *sui generis*, for it partakes, essentially, of an inquiry to determine whether the delinquent practioner is unworthy of the trust and confidence which attend the relationship of attorney and client. . . . The object of disciplinary proceedings is not alone to punish the attorney guilty of malpractice; the primary purposes are to compel the attorney to deal fairly and honestly with his client, and to determine whether he has, by his conduct, proved himself unfit to be entrusted with the duties and responsibility of the office of attorney. [citations omitted].

Id., quoting, In re Ries, 13 N.J.L. 559, 562 (1944); *State v. Merski*, 437 A.2d 710, 714 (N.H. 1981).

Despite that such proceedings are neither criminal nor civil, the attorney facing disbarment is entitled as a matter of right to procedural due process. *In re Ruffalo*, 390 U.S. 554, 550, 88 S.Ct. 1222, 20 L. Ed. 2d. 117, 122 (1968), *reh'g denied*, 391 U.S. 961, 88 S.Ct. 1833, 20 L. Ed. 2d. 874 (1968). See also *Logan*, supra, at 228.

In *Erdmann v. Stevens*, 458 F. 2d. 1205 (2d Cir. 1972), the Court held that under New York law, a disciplinary proceeding is more akin to a criminal action than a civil action because loss of an attorney's license represents loss of that attorney's livelihood, and threatens loss of professional reputation, even if a penalty less than disbar ment is imposed. *Id.* at 1209-10.

While New Jersey Courts do not consider disciplinary proceedings to be of a criminal nature per se,[1] the N.J. Supreme Court has held on numerous occasions that all administrative proceedings must be conducted in conformance with due process. "Administrative Hearings and contested cases must operate fairly and conform with due process principles". *In re Kallen,* 92 N.J. 14, 25, *quoting, Laba v. Newark Bd. of Educ.,* 23 N.J. 364, 382 (1957). This requires principles of basic fairness be observed and adequate procedural protections be afforded. *Id.* at 25. These rights are guaranteed by the Fifth and Fourteenth Amendments. *David v. Strelecki,* 97 N.J. Super. 360, 369, *rev'd on other grounds,* 51 N.J. 563 (1968).

While the Court often cites to the need for due process, it is a concept more easily espoused than explained. The Appellate Division has said:

> Due process in its constitutional sense is little more than a metonym for fair play. [citation omitted] It connotes fundamental fairness. Due process is an element which, when missing, produces the reaction according to that which is "shocking to the universal sense of justice." *United States v. Russell,* 411 U.S. 423, 432, 93 S.Ct. 1637, 1643, 36 L. Ed. 2d 366 (1973).

State v. Lagnella, 144 N.J. Super. 268, 284 (1976).

In examining the standard of due process necessary in license revocation proceedings, the Court held that revoking one's drivers license affects drivers in a serious way, and may threaten their ability to earn a livelihood.

---

[1]However, in *In re Fleischer, supra,* the dissenting Justice likened disbarment to a criminal proceeding due to the severity of the penalty.

Therefore, such proceedings must meet incidents of fairness underlying due process. *In re Arndt,* 67 N.J. 432, 436 (1975); *David v. June Strelecki,* 51 N.J. 563, 566 (1968). The Court has held this is so even though holding a license is a privilege rather than a right. *Bechler v. Parsekian,* 36 N.J. 242, 256-57 (1961). If proceedings involving the loss of a driver's license are subject to such a high degree of due process because they entail the possible loss of one's livelihood, then disbarment proceedings must undergo at least the same scrutiny, as disbarment inevitably affects the attorney's livelihood.

In the case at bar, numerous rights of Mr. Skevins' were violated.

A. *Mr. Skevins' Right To Privacy Was Violated.*

The Rules of the Court provide:

> All proceedings conducted and records made pursuant to *R.* 1:20 shall be confidential and shall not be disclosed to or attempted by anyone except as authorized by these Rules or as provided by the Supreme Court and as follows:
>
> (1) On the scheduling of oral argument for final discipline by the Supreme Court, in which event the recommendation of the Board that is the subject thereof, together with any briefs filed pursuant to an Order of the Court, shall remain public; . . .

R. 1:20-10 (a).

Oral argument was scheduled on May 29, 1986. However, as set forth in the affidavit of John M. Skevin, Esq., numerous articles concerning this case appeared in various New Jersey and New York papers prior to that date. Publicity was not limited to print media, as commentaries

on television also appeared. (See Affidavit of John M. Skevin, Esq., August 6, 1986).

The rule itself reads that "all proceedings conducted and records made pursuant to *R.* 1:20 shall be confidential and shall not be disclosed or attended by anyone . . ." It provides that Mr. Skevin had a right to privacy prior to any release of this information. The New York Court of Appeals has dealt with a similar issue. *Matter of Dondi,* 63 N.Y. 2d 331, 482 N.Y.S. 2d 431, 472 N.E. 2d 281 (1984). In that case, also an attorney disciplinary matter, the grievance committee obtained sealed records of a prior criminal proceeding involving that attorney. That proceeding had been terminated in the attorney's favor. The Court held that substantial damage to the attorney's right to privacy had occurred because the grievance committee had not complied with proper proceeding in obtaining those records. The Court held that the only viable remedy was to dismiss the case. *Id.,* 482 N.Y.S. at 432.

Florida has reached a like determination. Under the disciplinary rules of that state, when information concerning a confidential attorney disciplinary case is to be revealed, the respondent is given fifteen (15) days notice in which to protest the release of that information. In the *Florida Bar v. Rubin,* 362 So. 2d 12 (Fla. 1978), the disciplinary committee released that report prior to the running of the fifteen (15) days, and before the respondent had a chance to protest that release. Widespread publicity resulted, and the Court held that in a case in which the recommended penalty was a private reprimand, and the respondent had been damaged by the unwarranted publicity, the inexcusable breach on the part of the committee could only be remedied by dismissal of the case. *Id.* at 17.

Rubin is similar to the case at bar. Numerous breaches of confidentiality have taken place, as evidenced by the articles cited to earlier, and as addressed in letters dated September 3, 1985 and May 6, 1986 by Judge Herbert. (Exhibits to Affidavit of John M. Skevin, Esq., August 6, 1986). In the August 13, 1985 edition of *The Bergen Record,* (Affidavit of John M. Skevin, August 6, 1986) the OAE was quoted as saying, "I want to see this guy get what he deserves, at least in my opinion." These articles, and others listed earlier herein, resulted in much undue and painful publicity to Mr. Skevin, as set forth at length in his Affidavit. Despite that misrepresentations made by the Schraders maligned Respondent, he respected the confidentiality of these proceedings and did not defend himself. Respondent suffered damages as a result of this. It is clear, therefore, that Mr. Skevin's due process right to privacy has been blatantly violated.

Due process is so important a right, that the New Jersey Supreme Court has held that where the attorney/client privilege is violated by improper eavesdropping by public officials, dismissal of the prosecution might sometimes be necessitated. *State v. Sugar,* 84 N.J. 1, 19, (1980). The Court explained:

> In either case official intrusion would prevent defense counsel from providing constitutionally effective assistance. Because these more egregious violations do not involve the disclosure of evidence, an exclusionary remedy would be insufficient to vindicate defendant's right, deter official misconduct, or maintain judicial integrity. A dismissal of the prosecution would thus be necessary as the only means to avoid a deniel of one of the fundamental requirements of due process of law.

Id.

While the Court did not find it necessary to dismiss the case, that it would even consider doing so in a murder case shows the importance of procedural due process in the judicial system.

In the case at bar, Mr. Skevin's due process rights have been violated. The affidavit of Mr. Skevin sets forth the damages he has suffered due to this violation of his rights. Because his rights have been violated so outrageously, Mr. Skevin is entitled to some form of relief. This relief ought to take the form of either dismissal of the within action, or mitigation of penalty.

B. *Mr. Skevin's Right To a Fair Hearing and Determination Have Been Prejudiced.*

In *Landmark Communications v. Commonwealth,* 217 Va. 694, 233 S.E. 2d 120 (1977), the Virginia Supreme Court recognized that breach of the confidentiality of certain proceedings is "so contrary to the public interest that it constitutes a subtantive evil of immediate and serious peril to the orderly administration of justice, and therefore, should be punishable." 235 S.E. 2d at 127, *rev'd and remanded,* 435 U.S. 829, 98 S.Ct. 1535, 56 L. Ed. 2d 1 (1978) (The Court upheld this doctrine, but did not find clear and present danger in that case).

Likewise, the New Jersey Supreme Court has held that the State has a substantial interest in insuring the fairness of judicial proceedings. *In re Hinds,* 90 N.J. 604 (1982). Additionally, in *State v. Sugar,* the Court declared that fundamental fairness prohibits the conduct by law enforcement officials that would pervert the judicial process and turn it into a prosecutorial tool. "To

allow such conduct would erode public confidence in the impartiality and fairness of the judicial process." *Id.* at 14-15, *quoting, State v. Molnar,* 81 N.J. 475, 485 (1980).

While it is generally held that prejudice is a concern only in a jury trial, *See, e.g., In re Hinds,* 90 N.J. 604, the Court still must consider the problem herein. First, members of the DRB were not all attorneys or experienced jurists. Several of them were "lay persons". That numerous articles appeared in the newspapers urging Mr. Skevin's disbarment just prior to the DRB decision is significant. (Articles appeared on June 8, 1984; August 26, 1984; August 13, 1985; May 6, 1986; May 31, 1986; June 1, 1986; June 5, 1986; and June 22, 1986. Judge Herbert rendered his decision on March 12, 1986 and the DRB and May 23, 1986). These members of the DRB should not be evaluated in the same way as Judges or other jurists. They are lay people and are subject to the same influences as are present in a jury situation. Therefore, the improper publicity prior to the rendering of that decision made it difficult, if not impossible, for Mr. Skevin to obtain a fair review.

Secondly, a more complex and difficult analysis also indicates that Mr. Skevin cannot be given a fair review under these circumstances. The Court in *In re Wilson* indicated that one of the most important concerns of attorney disciplinary hearings is to maintain the faith of the public in the New Jersey Bar. The perceptions of the general public therefore play an important role in the Court's decisions. However, due to the improper publicity this case has received, the general public has already been persuaded that Mr. Skevin is guilty and should be disbarred, or has been disbarred. (See Affidavit of John

M. Skevin, Esq., August 6, 1986). The court is now caught between the proverbial rock and the hard place. In order to maintain public confidence, the court may feel it must disbar Mr. Skevin, whether or not he is deserving of disbarment. The publicity in this case has therefore made it impossible for Mr. Skevin to receive a fair determination and the proceeding herein ought to be dismissed.

This dismissal would advance the important policy of enforcing the integrity of the confidentiality rule. In *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966) a criminal matter, the United States Supreme Court held that: "If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but pallitives; the care lies in those remedial measures that will prevent the prejudice at its inception. The Court must take such steps by rule and regulation that will protect their processes from prejudicial outside interference."

Dismissal would also serve to advance the important policy of complainants maintaining confidentiality. As is clear from the record and recognized by Judge Herbert (See letters from Judge Herbert, September 3, 1985 and May 6, 1986, respectively Exhibits "C" and "D" of the Affidavit of John M. Skevin, Esq., August 6, 1986 and also attached hereto), the Schraders repeatedly violated the confidentiality rules, despite repeated warnings by the Office of Attorney Ethics and the DRB. (Said letters are attached for the Court's convenience).[2] Only dismissal

---

[2]The logic of having a rule which permits release of the DRB report once the case is scheduled for oral argument, when

(Continued on following page)

would make it clear to other complainants that the rules of confidentiality must be respected, and the Court should deliver this message by dismissing the within matter.

———o———

CONCLUSION

FOR the reasons stated herein, Mr. Skevin should not be disbarred, all proceedings against him should be dismissed, or in the alternative, any penalty imposed upon him should be mitigated based on the facts of this case.

Respectfully submitted,

GREENSTONE & SOKOL, ESQS.

By: /s/ Leon J. Sokol

Dated: August 11, 1986

(Continued from previous page)

the DRB requests complainants to maintain confidentiality, is unclear. Respondent suggests that the Court re-evaluate Rule 1:20-10(a). There appears to be no good reason to make these facts public prior to this Court's final determination, and such undue publicity has damaged Respondent. Because he was a public figure, the press seized upon this case. As a result, Mr. Skevin's long history of public service worked against him, diminishing his ability to practice.